MISSISSIPPI LAW JOURNAL

ARTICLES

JUST COMPENSATION VIA FAIR MARKET VALUE RULE MAY NOT INCLUDE THE KITCHEN SINK— IT COULD BE NONCOMPENSABLE

Thomas R. Jones

ESTATE PLANNING AND MISSISSIPPI'S ESTATE TAX

Edward E. Milam

COMMENTS

FEDERAL AND STATE CLASS ACTIONS: DEVELOPMENTS AND OPPORTUNITIES

THE MISSISSIPPI PUBLIC TRUST DOCTRINE: PUBLIC AND PRIVATE RIGHTS IN THE COASTAL ZONE

DIFFUSED SURFACE WATERS IN MISSISSIPPI

STANDING TO CONTEST ILLEGAL SEARCHES AND SEIZURES

VOLUME 46 **WINTER 1975** **NUMBER 1**

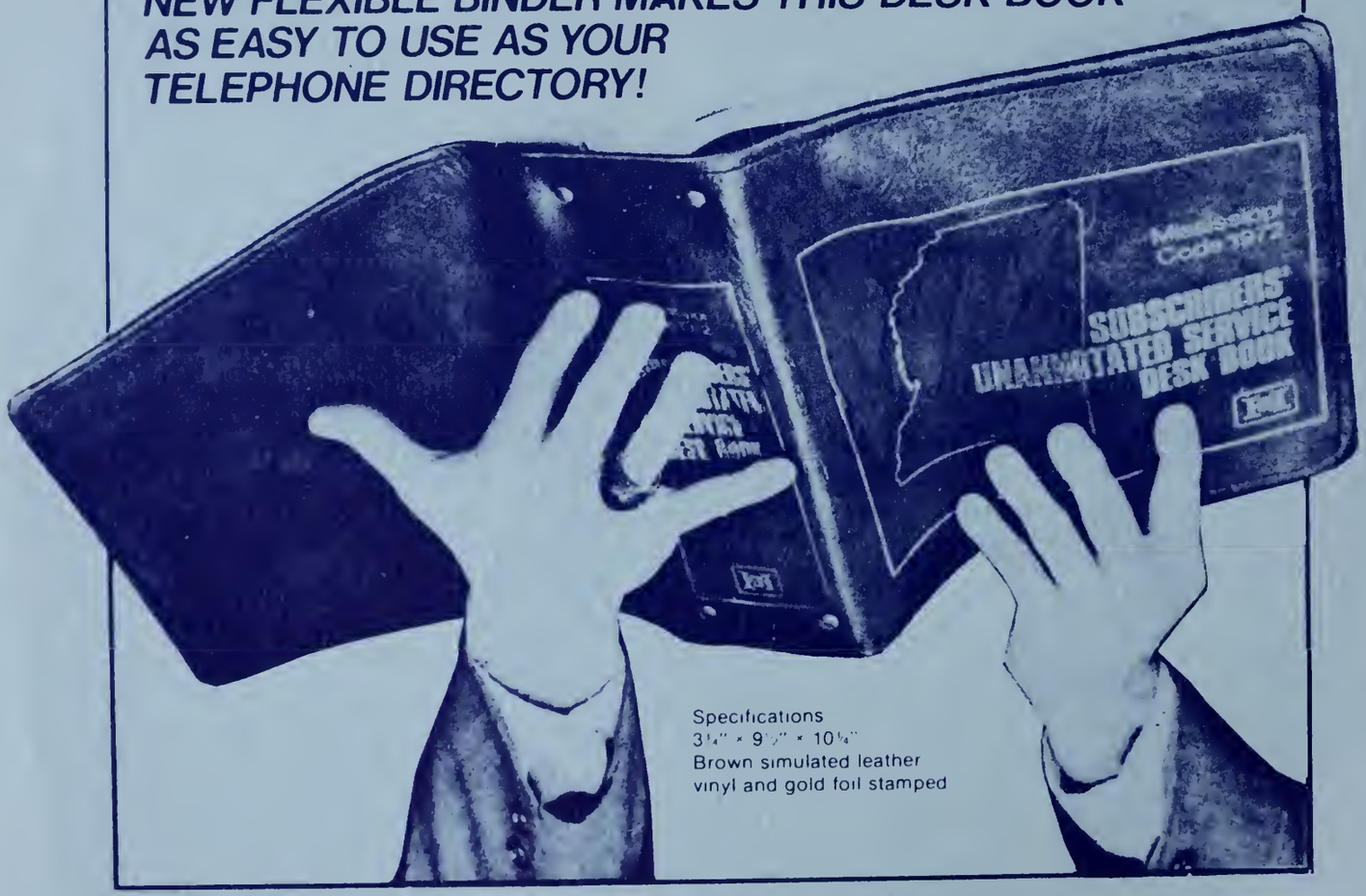
An Exclusive Service for Harrison's Mississippi Code 1972 Annotated Subscribers.

Because of the inconvenience, at times, of working with several volumes of the annotated code, The Harrison Company saw the need to provide a practical and quick access to the statutory law. The result is the Subscriber's Unannotated Service Desk Book.

This service is not for sale. The Harrison Company has prepared this desk book for the exclusive use of its subscribers, and it may only be obtained as a complimentary service resulting from the purchase from The Harrison Company of a set of the Mississippi Code 1972 Annotated.

This convenient one volume desk book contains the statutory material found in all volumes of the Mississippi Code 1972 Annotated.

NEW FLEXIBLE BINDER MAKES THIS DESK BOOK AS EASY TO USE AS YOUR TELEPHONE DIRECTORY!



Specifications
3¼" × 9½" × 10⅛"
Brown simulated leather vinyl and gold foil stamped

Dial (404) 522-7242, Our 24 Hour Customer Service Desk

THE HARRISON COMPANY, PUBLISHERS

178 - 180 Pryor Street • Atlanta, Georgia 30303

Call us any time . . . for services rendered by Mississippi's largest Trust Department. We at Deposit Guaranty National Bank welcome the opportunity to work with attorneys in serving the needs of their individual and industrial clients. Services are offered in matters involving trusts, wills, estates, pension programs and retirement plans. Call us at any time . . . we look forward to hearing from you.

TRUST DEPARTMENT
DEPOSIT GUARANTY NATIONAL BANK
GROW WITH US/JACKSON, MISS./MEMBER F.D.I.C.

Teamwork. Mid-South Title's National Department works hand-in-hand with Mississippi attorneys in real estate title matters—an important reason we lead the league in the Mid-South. Sole agent for Commerce Title Guaranty Co.

MID-SOUTH TITLE COMPANY
12 South Main Street Memphis, Tennessee 38103
W. J. "Bill" Gallagher, Vice Pres. 901/523-8121

MST

The MISSISSIPPI LAW JOURNAL is published by University of Mississippi law students seven times annually in January, April, June, July, September, November, and December. Editorial and business offices: Mississippi Law Journal, P.O. Box 146, University, Mississippi 38677.

Current subscription: $12.00 per year. Single issue, $3.00. Bar Directory, $2.50. Subscriptions are renewed automatically upon expiration unless the subscriber sends notice of termination.

Change of address: Members of the Mississippi State Bar send address changes to the Mississippi State Bar, P.O. Box 1032, Jackson, Mississippi 39205. All other subscribers send address changes directly to the Mississippi Law Journal. Include name, new address (including zip code) and old address. Please notify 45 days in advance to ensure prompt delivery.

Unless a claim is made for nonreceipt of Journal issues within 6 months after the mailing date, the Mississippi Law Journal cannot be held responsible for supplying those issues without charge.

Second class postage paid at University, Mississippi 38677 and additional mailing offices.

Citations conform to *A Uniform System of Citation* (11 ed. 1967), copyright by the Columbia, Harvard, and University of Pennsylvania Law Reviews and the Yale Law Journal.

The Mississippi Law Journal is a member of the National Conference of Law Reviews.

The JOURNAL seeks to print matter of merit and interest; being desirous of offering freedom to contributors, it assumes no responsibility for the views expressed herein.

Sooner or later you will represent a client with

Social Security problems

Sooner or later you'll need U.S.C.A.

The broadened coverage of the Social Security Act in recent years means that sooner or later you will represent a client with Social Security problems. People from all walks of life and a myriad of circumstances — the disabled, the widowed, the aged, the retired, children of deceased parents — need legal advice to questions concerning Social Security benefits. Social Security is only one of the many areas of federal law where your advice is needed. Shouldn't you see what U.S.C.A. can do for you and your client?

WEST PUBLISHING COMPANY
Frank R. Martin
P.O. Box 1781
Jackson, Miss. 39205
Phone: 601/362-2096

Judge the facts, and you'll appoint us.

Nobody needs to tell you the importance of weighing all the facts in order to make a sound decision. Especially when that decision is where to invest money.

So consider, if you will, these facts:

We've got the investment alternative that's nothing short of custom-fitted to your investment need. For the short-term, it's our Daily Interest account. Like the name says, you earn interest, *paid daily,* from date of deposit to date of withdrawal. Just like clockwork. Great for your own idle funds or for money soon to be transferred.

For estate or court-controlled funds, one of our Unifirst Certificates of Deposit* will do a particularly good job. You get a high rate of return, without a high risk.

But here's the clincher. DialAccount. The telephone transfer service that lets you withdraw money from your checking account and deposit it in your Unifirst Daily Interest account, just by calling us. Think of the times you had money to invest, but didn't have the time to do it. Now you do, thanks to Unifirst's DialAccount.

Judge the facts. You'll want to appoint us as your place to invest.

It's an open-and-shut case.

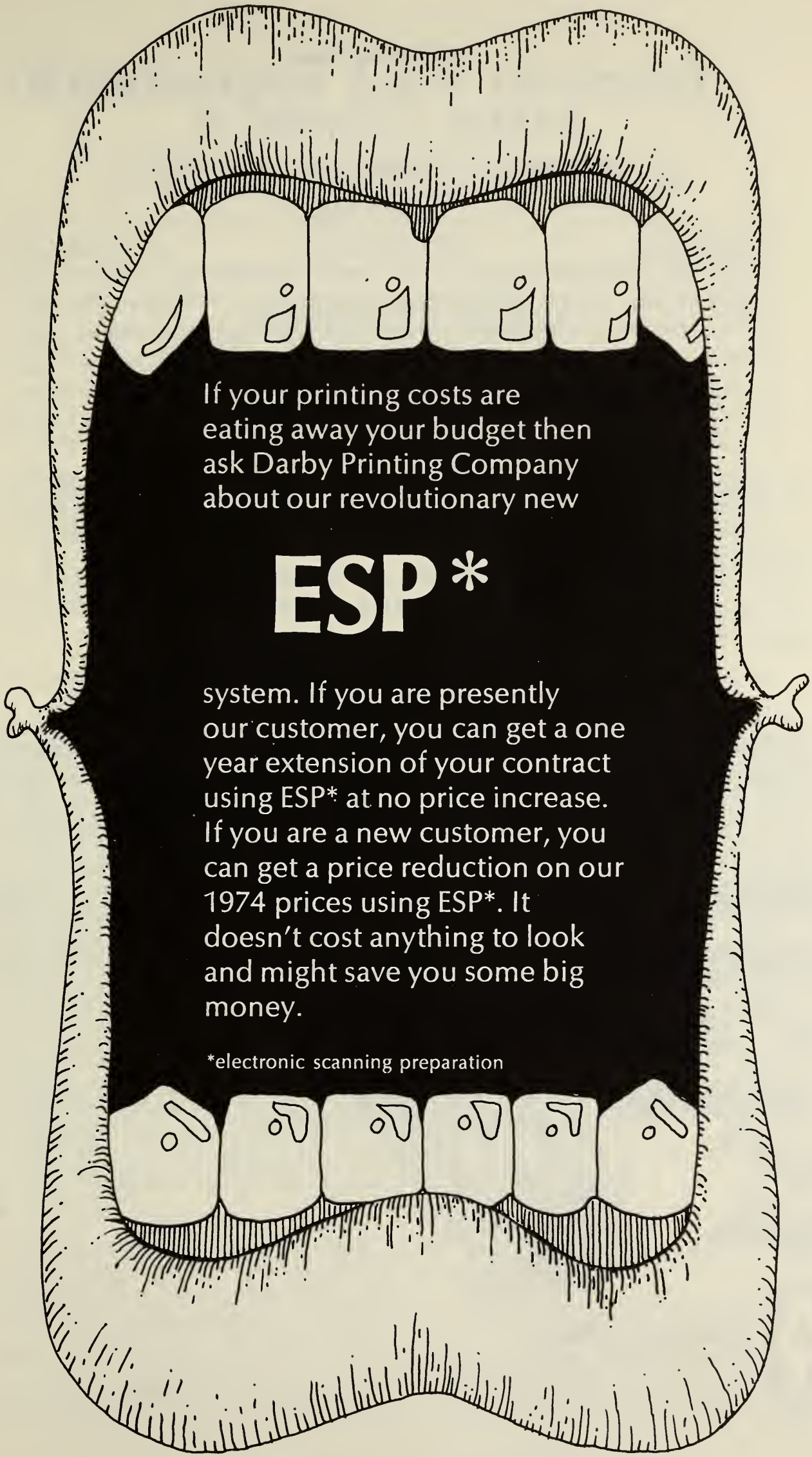
Unifirst®

Unifirst Federal Savings and Loan Association

Accounts now insured to $40,000 by the FSLIC, an agency of the United States.

*A substantial interest penalty is required for early withdrawal.

Printing Cost Up 6-10%



If your printing costs are eating away your budget then ask Darby Printing Company about our revolutionary new

ESP*

system. If you are presently our customer, you can get a one year extension of your contract using ESP* at no price increase. If you are a new customer, you can get a price reduction on our 1974 prices using ESP*. It doesn't cost anything to look and might save you some big money.

*electronic scanning preparation

DARBY PRINTING COMPANY
715 W. WHITEHALL ST., S.W.
ATLANTA, GEORGIA 30310
TELEPHONE (404) 755-4521

Handwriting Expert

GILBERT J. FORTIER, JR.

Examiner of Questioned Documents

Since 1946

Scientific identification of questioned handwriting, handprinting, typewriting, ink, paper, alterations, erasures, obliterations, etc. Complete laboratory equipment consisting of specially adapted cameras, lenses, microscopes, measuring devices, chemicals, ultra-violet and infra-red apparatus, paper and ink testing devices, and all other necessary scientific instruments. Qualified witness in Federal and State Courts, civil and criminal, regarding documentary disputes. Photographic exhibits prepared for court demonstration. Portable equipment for examining and photographing filed and impounded documents at any location.

3024 DE SOTO ST. — PH. (504) 482-8160
NEW ORLEANS, LA. 70119

We're exploding the "biggest is always best" myth.

We're doing it the only way it can be done. By performance. And that means providing the full spectrum of title insurance needs in the areas we serve every bit as skillfully as the "big guys."

At Mississippi Valley Title Insurance Company, we know our area so well because it's our home. We've lived here all along. So it stands to reason that we have a better working knowledge of the local laws and standards of procedure, and a fuller understanding of the subtle differences we've discovered through years of experience.

And beyond that basic advantage, we have only the most modern electronic data processing equipment, a full staff of dedicated professionals and a tradition of quick, accurate service to boot. In short, we perform with the best of them.

If you need help in the Southeast, we can fill the bill. We may not be the biggest, but we think we're the best.

Mississippi Valley Title Insurance Company

Home Office: Jackson, Miss./315 Tombigbee/P. O. Drawer 2428
Branch offices in Birmingham, Little Rock, Memphis, Mobile
Offices or agents in Miss., Ark., La., Ala., Fla., N.C., S.C., Ga

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR and
the UNIVERSITY of MISSISSIPPI SCHOOL OF LAW

VOLUME 46 WINTER 1975 NUMBER 1

MISSISSIPPI STATE BAR

1974-75

OFFICERS

James Hugh Ray of Tupelo	President
Frank D. Montague, Jr. of Hattiesburg	President-Elect
L. F. Sams, Jr. of Tupelo	Second Vice-President
George van Zant of Jackson	Executive Director and Secretary-Treasurer

COMMISSIONERS

Fred M. Bush, Jr.	Tupelo	Elzy J. Smith	Clarksdale
Norman Breland	Gulfport	Joe A. Thompson	Hattiesburg
Ottis B. Crocker, Jr.	Bruce	Aleita M. Sullivan	Mendenhall
Howard Dyer, Jr.	Greenville	John Gordon Roach, Jr.	McComb
John E. Shaw	Kosciusko	Jack A. Morris	Monticello
John T. Green	Natchez	Dewitt T. Hicks, Jr.	Columbus
Sam Wilkins	Jackson	Ronald L. Taylor	Southaven
Morris Phillips, Jr.	Carthage	Lunsford Casey	Laurel
Gerald Braddock	Vicksburg	Charles R. McRae	Pascagoula
Walter Eppes, Jr.	Meridian	James H. Herring	Canton

MEMBERS OF THE LAW JOURNAL-LAW SCHOOL LIAISON COMMITTEE

Hugh N. Clayton, *Chairman*
New Albany

Will A. Hickman, *Vice-Chairman*
Oxford

Lowell E. Grisham
Oxford

Lester F. Sumners
New Albany

W. W. Eppes, Jr.
Meridian

L. F. Sams, Jr.
Tupelo

Claude Clayton, Jr.
Tupelo

Frank J. Hammond, Jr.
Moss Point

Phineas Stevens
Jackson

Frank Thackston
Greenville

Joel P. Walker
Hernando

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR and
the UNIVERSITY of MISSISSIPPI SCHOOL OF LAW

VOLUME 46 WINTER 1975 NUMBER 1

Copyright © 1975, Mississippi Law Journal

TABLE OF CONTENTS

ARTICLES

Just Compensation Via Fair Market Value Rule May Not Include the Kitchen Sink — It Could Be Noncompensable ..... *Thomas R. Jones* 1

Estate Planning and Mississippi's Estate Tax ..... *Edward E. Milam* 27

COMMENTS

Federal and State Class Actions: Developments and Opportunities 39

The Mississippi Public Trust Doctrine: Public and Private Rights in the Coastal Zone 84

Diffused Surface Waters in Mississippi 118

Standing to Contest Illegal Searches and Seizures 147

RECENT DECISIONS

Deeds of Trust—Future Advances—Debt Secured by Deed of Trust on Homestead Property Providing for Future Advances May Be Enlarged by One Spouse Acting Alone in Obtaining an Additional Advance or Subsequent Loan (*Newton County Bank v. Jones*, Miss. 1974) 169

Constitutional Law—School Desegregation—Absent Multidistrict Constitutional Violations, There Is No Basis for a Court-Ordered Multidistrict Remedy (*Milliken v. Bradley*, U.S. 1974) 181

COMMERCIAL LAW—PAROL EVIDENCE—ADDITIONAL TERMS ARE INADMISSIBLE TO VARY OR CONTRADICT AN INTEGRATED WRITING (*Noble v. Logan-Dees Chevrolet-Buick, Inc.*, Miss. 1974) 192

BOOK REVIEW

ARBITRATION OF INTEREST DISPUTES: PROCEEDINGS OF THE TWENTY-SIXTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS ..... *Earl W. DeHart* 201

MISSISSIPPI LAW JOURNAL BACK ISSUES — CUMULATIVE INDEXES

Back Issues for Volumes 1-45	$3.00
New Index for Volumes 31-40	6.00
Index for Volumes 21-30	3.00
Index for Volumes 1-20	3.00
Complete Set of Above Indexes	10.00

Send order to:

MISSISSIPPI LAW JOURNAL
P. O. Box 146
University, Mississippi 38677

JUST COMPENSATION VIA FAIR MARKET VALUE MAY NOT INCLUDE THE KITCHEN SINK—IT COULD BE NONCOMPENSABLE

*Thomas R. Jones**

Introduction

The State of Mississippi is now executing the most ambitious public works project of its history. The $300 million highway program adopted by the legislature in 1969[1] and the $600 million highway program passed in 1972[2] will finance the construction of hundreds of miles of new roads and highways, as well as service roads, ramps, cloverleafs, bridges, and crossings. Additionally, ever-increasing citizen demands and expansion of government services are resulting in growing pressures upon public and quasi-public bodies to obtain private property for public use.

The inevitable increase in condemnation proceedings will necessitate a better understanding of these suits, which are now all too often viewed by the bench and bar as little more than "swearing matches."[3] This attitude exists primarily because lawyers and courts have shown little interest in eminent domain litigation. Everyone appears satisfied to pay lip service to the "before and after" rule,[4] while actually awarding compensation on other grounds. Misunderstanding also exists as to the proper manner of ascertaining just compensation which must be paid

---

*B.B.A. 1954, LL.B. 1958, University of Mississippi; Partner, Bourdeaux & Jones, Meridian, Mississippi.

The author is greatly indebted to F. Gerald Burnett for research and editorial assistance.

[1] Law of Oct. 9, 1969, ch. 39, [1969] Gen. & Local & Private Laws Miss. Extra. Sess. 158.

[2] Law of May 10, 1972, ch. 483, [1972] Gen. Laws Miss. 638.

[3] *See* Mississippi State Highway Comm'n v. Terry, 288 So. 2d 465 (Miss. 1974).

[4] Mississippi adheres to the "before and after" rule in arriving at the fair market value of property in a condemnation proceeding. In Mississippi State Highway Commission v. Hillman, 189 Miss. 850, 198 So. 565 (1940), the court announced the formula for computing the before and after value of property, subject to a condemnation proceeding:

> When part of a larger tract of land is taken for public use, the owner should be awarded the difference between the fair market value of the tract immediately before the taking, and the fair market value of that remaining immediately after the taking, without considering general benefits or injuries resulting from the use to which the land taken is to be put, that are shared by the general public.

Id. at 866, 198 So. at 569.

to property owners in condemnation proceedings.

The purpose of this article is to illustrate two basic propositions applicable to condemnation proceedings: First, that there are two separate and divergent standards which compete for the determination of "just compensation"—fair market value[5] and indemnity[6]—(and those standards do not mix); secondly, that contrary to popular belief, when the fair market value standard is applied, not all damages are legally cognizable—some damages are *damnum absque injuria* and therefore not compensable.[7]

I. The Fair Market Value Rule

A. The Constitutional Mandate

The Mississippi constitution lays the foundation for compensation due a landowner in a condemnation proceeding.[8] It states, in part: "Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law. . . ."[9] Thus, the requirement is twofold: the condemnor must pay and the landowner must receive "due compensation." The legislature has adhered to the constitutional mandate that due compensation be paid "in a manner to be prescribed by law."[10] At an early date the Mississippi Supreme Court recognized that "due compensation" is a judicial and not a legislative question.[11] Judi-

---

[5] For a definiton of the "fair market value" approach, see text accompanying note 45 *infra*.

[6] The indemnity approach to value compensates the landowner for all injuries, whether to his person or his property.

> It [the indemnity standard] takes into account all of those so-called "consequential" injuries, to the owner's person, as well as to his remaining "property," which are attributable to the loss of the particular property that is being valued.

1 L. Orgel, Valuation Under the Law of Eminent Domain § 14, at 75 (2d ed. 1953) [hereinafter cited as Orgel].

Thus, under the indemnity standard, an award to a landowner is not limited to the difference between the fair market value of the property before and after the taking of a portion for public use, as is the case under the fair market value approach. The indemnity standard is sometimes referred to as the "value to the owner" approach. *See* 4 J. Sackman, Nichols' The Law of Eminent Domain § 12.1 [5] (rev. 3d ed. 1971) [hereinafter cited as Sackman, Nichols on Eminent Domain].

[7] *See* Address by Julius L. Sackman, Institute on Planning, Zoning, and Eminent Domain, Oct. 21-22, 1971, in Proceedings of the Institute on Planning, Zoning, and Eminent Domain 223 (Southwestern Legal Foundation 1972) [hereinafter cited as Sackman, *Avoiding Costly Errors*].

[8] Miss. Const. art. 3, § 17.

[9] *Id.*

[10] Miss. Code Ann. §§ 11-27-1 *et seq.* (1972).

[11] Isom v. Mississippi Cent. R.R., 36 Miss. 300 (1858); *accord*, Mississippi State Highway Comm'n v. Hillman, 189 Miss. 850, 198 So. 565 (1940).

cial power is thus a limitation upon the power of the legislature to prescribe the rule of damages through which an owner will obtain the due compensation which is constitutionally guaranteed.

The compensation constitutionally guaranteed a landowner has been a perplexing problem for the courts. Since the question of compensation is a judicial one, one might conclude that a clear understanding is attainable through a study of the pertinent cases. Nothing could be further from the truth.

The Mississippi Supreme Court has recently noted that at least four different descriptive words have been used to describe the compensation to which a landowner is entitled in a condemnation proceeding.[12] Those words are "just," "due," "full," and "adequate."[13] Those words add nothing to the meaning of "due compensation." The phrase "due compensation" includes the value of the property taken and damage, if any, to the property which is not taken. More than that cannot be inferred.[14]

B. Standards: Fair Market Value vs. Indemnity

The search for guidelines and formulas to measure due compensation to which an owner is constitutionally entitled has produced three distinct standards of valuation: value to the taker, value to the owner, and market value.[15] In almost every jurisdiction value to the taker and value to the owner are rejected as the measure of damages.[16] Market value is an artificial compromise between value to the taker and value to the owner. Mississippi, like most jurisdictions, adheres to the market value rule, but apparently in name only,[17] as will be discussed later.

Recitation of the "due compensation" guidelines and formulas is easy; an understanding of them is somewhat more difficult. Their application has been perplexing, as evidenced by the vast quantity of articles appearing in legal periodicals explaining and elaborating upon "just" and "due" compensation.[18] Judicial decisions where conflict between

---

Dictum of the Mississippi Supreme Court in a relatively recent case suggests that the question is a legislative one. Mississippi State Highway Comm'n v. Central Land & Rental Corp., 239 So. 2d 335 (Miss. 1970). "The indemnity rather than the unit valuation approach has been urged by several scholars, *but changes in this respect are essentially legislative and not judicial tasks." Id.* at 337 (emphasis added).

[12] Sarphie v. Mississippi State Highway Comm'n, 275 So. 2d 381 (Miss. 1973).

[13] *Id.* at 384.

[14] United States v. Miller, 317 U.S. 369, 374 (1943).

[15] *See* Rollins, *The Proper Measure of Damages in a Total Taking,* in PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN 37, 43-44 (Southwestern Legal Foundation 1959).

[16] 1 ORGEL, *supra* note 6, §§ 13-14, at 74-76.

[17] Mississippi State Highway Comm'n v. Hillman, 189 Miss. 850, 198 So. 565 (1940).

[18] *See, e.g.*, Bigham, *"Fair Market Value," "Just Compensation," and the Constitution: A Critical View,* 24 VAND. L. REV. 63 (1970); Johnston, *"Just Compensation" for*

the forces of the indemnity and market value doctrines often produce victories for each side[19] (sometimes even in the same case) further cloud the law of compensation.[20] These decisions crystallize the irreconcilable results in this field of law, which has been "fashioned out of the conflict between the people's interest in public projects and the principle of indemnity to the landowner."[21]

At the present time in the development of eminent domain law, no definitive judicial position is in focus; decisions seem to drift from one standard to the other. The purpose of this article is not to advance one standard over the other. However, since Mississippi adheres to the fair market value rule, it and the consequences of its application will be briefly examined. A thorough examination of the market value rule is essential to an understanding of noncompensable injuries.

Probably the greatest impediment to a sound understanding of the market value rule is the failure of attorneys and courts to comprehend that the rule is based on the res concept. This means that compensation is based on the property itself and not on the landowner's losses.[22] Our court has recognized that eminent domain proceedings are against the

---

Lessor and Lessee, 22 VAND. L. REV. 293 (1969); Kanner, *Condemnation Blight: Just How Just is Just Compensation?*, 48 NOTRE DAME LAW. 765 (1973); Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596 (1954); Mandelkeir, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 3; Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Searles, *Highest and Best Use: The Keystone of Valuation in Eminent Domain*, 45 N.Y. ST. B.J. 36 (1971); Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61 (1957).

[19] Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893) (just compensation held to be the value of the property taken from the landowner, and not the value to the landowner himself). *But see* United States v. Miller, 317 U.S. 369, 373 (1943) ("The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.")

[20] Mississippi State Highway Comm'n v. Central Land & Rental Corp., 239 So. 2d 335 (Miss. 1970) (rejection of the indemnity approach to valuation in favor of the fair market value approach—lessee nevertheless permitted to recover damages for expenses of removing personal property). Obviously, a lessee's moving expenses cannot relate, in any manner, to the market value of the property being condemned.

[21] United States *ex rel.* TVA v. Powelson, 319 U.S. 266, 280 (1943).

[22] Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893). The Court said:

> And this just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. "No person shall be held to answer for a capital, or otherwise infamous crime," etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the "just compensation" is to be a full equivalent for the property taken.

Id. at 326. *But see* United States v. Miller, 317 U.S. 369, 373 (1943).

property itself.[23] The compensation must be based on the property rights taken without regard to the owner or his personal relationship to the property taken.[24]

The Supreme Court of Mississippi and other courts are currently so preoccupied with ensuring landowners full and just compensation that they often mistakenly equate the fair market value formula with complete indemnity for all possible losses.[25] Confusion results because such decisions are often nominally based on fair market value, while in fact they represent an indemnity approach to valuation. The judicial attitude demonstrates the courts' inability or unwillingness to recognize the fundamental differences between the indemnity and market value concepts.

An example of a case utilizing, in part, the indemnity approach under the guise of the fair market value rule is *Mississippi State Highway Commission v. Central Land & Rental Corp.*[26] After unequivocally rejecting the indemnity approach in favor of the market value approach, the court admitted evidence by a lessee regarding his moving expenses. According to the court, this evidence was admissible only as bearing on the overall value of the unexpired portion of the leasehold and not as a separate compensable item of damage.[27] The duplicity is apparent since moving expenses can never affect the value of a leasehold. No "willing purchaser" of the lease would pay anything for the removal of personal property from the leased property.

Again in *Mississippi State Highway Commission v. Rogers,*[28] a jury was permitted to consider testimony relating to an owner's moving expenses. The court authorized this anomaly "so that the jury in their considerations may estimate the before value and the after value."[29] What the court failed to realize is that the "before and after" rule is applicable to determine the value and damages to *property* and not people. The term "market value," when judicially applied, attaches to the property being condemned, not to the person of the owner; only the value which is attached to the property is to be considered.[30]

---

[23] Evans v. Mississippi Power Co., 206 So. 2d 321 (Miss. 1968) (condemnation is a proceeding in rem, against the property, and not the person; the owners are merely summoned into court so that they can assert their claim to the res). *See also* 26 AM. JUR. 2d *Eminent Domain* § 130, at 788-89 (1966).

[24] 4 SACKMAN, NICHOLS ON EMINENT DOMAIN, *supra* note 6, § 12.22 [2], at 12-95.

[25] *See, e.g.*, Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943); Jacksonville Expressway Authority v. Henry G. Du Pree Co., 108 So. 2d 289 (Fla. 1958); Mississippi State Highway Comm'n v. Rogers, 242 Miss. 439, 136 So. 2d 216 (1961).

[26] 239 So. 2d 335 (Miss. 1970).

[27] *Id.* at 337.

[28] 242 Miss. 439, 136 So. 2d 216 (1961).

[29] *Id.* at 445, 136 So. 2d at 218.

[30] *See generally* 29A C.J.S. *Eminent Domain* § 136(7) (1965).

Failure to follow or failure to understand this concept of value accounts for a great deal of testimony improperly admitted in trials of eminent domain cases. The result is tortured explanations of fair market value which are recited by both appellate and trial courts.[31] Legislative bodies also have been led astray.[32]

The courts are properly oriented to the end that full compensation should be paid to landowners for all losses. Unfortunately, this objective has been accomplished in Mississippi under the guise of the fair market value rule, while an indemnity approach to value has in fact been applied.[33] The encroachment of indemnity concepts makes a condemnor properly using the market value approach appear to shortchange a landowner.

C. The Relocation Acts

It is no longer necessary for our court to deviate from the fair market value approach because the Uniform Relocation Act has been adopted in this state.[34] Since the passage of the Uniform Relocation Act by both federal[35] and state[36] governments, many of the ills inflicted on landown-

---

[31] Mississippi State Highway Comm'n v. McArn, 246 So. 2d 512 (1971); Mississippi State Highway Comm'n v. Rogers, 242 Miss. 439, 136 So. 2d 216 (1961).

[32] An excellent example is found in Miss. Code Ann. § 2760 (1956), *repealed*, Act of April 15, 1971, ch. 520, § 26, [1971] Gen. Laws Miss. 802. That statute stated, in part:

> The defendant is entitled to due compensation, not only for the value of the property to be actually taken as specified in the application, *but also for damages, if any, which may result to him as a consequence of the taking* . . . .

(Emphasis added).

It is readily apparent that the draftsmen of the statute had combined two completely different types of damages in order to determine the amount of due compensation to be awarded. The first type of damage is the value of the property taken. The second is any consequential damages that might result, not to the remaining property, but to the *owner*. Thus, the faithful "before and after" rule, which is geared exclusively to property values, was replaced with an indemnity statute tied directly to an owner's whole, full, and complete loss.

Perhaps the most interesting feature of this situation is that at the time of drafting no one seemed to understand that the new statute provided for the payment of damages resulting directly to a person, rather than to a reduction in value of the property itself. Both the bench and bar had been adhering to the strict fair market value rule.

[33] Mississippi State Highway Comm'n v. Central Land & Rental Corp., 239 So. 2d 335 (Miss. 1970). The court rejected the indemnity approach, stating that the fair market value approach was to be used in Mississippi; yet it permitted recovery by a lessee of moving expenses which is explicitly an indemnity and not a fair market value approach.

[34] MISS. CODE ANN. §§ 43-39-1 to -27 (Supp. 1973).

[35] Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-55 (1970).

[36] MISS. CODE ANN. §§ 43-39-1 to -27 (Supp. 1973). The first comprehensive relocation assistance program became effective in Mississippi in 1971. Law of July 1, 1970, ch. 440, § 11, [1970] Gen. Laws Miss. 618 (repealed 1972). It was enacted in response to the

ers have been eliminated. Public condemnors are now administratively awarding to condemnees those expenses which recently were awarded judicially and only through tortured explanations of fair market value. On the assumption that all state roads, as a part of the system of roads in the state, are related to the federal aid roads, the Mississippi State Highway Commission now administratively provides complete relocation payments for all of its acquisitions, whether or not the project is federally aided.[37]

There is ample judicial review available to a landowner for relocation payments under the Mississippi act.[38] The federal act, however, does not provide for judicial review.[39]

Hopefully our courts will soon utilize the principles of the relocation acts and allow them to fill the compensation gap that existed prior to their enactment. The practical effect will be elimination of the existing practice wherein the condemnee's witnesses speak of value in terms of indemnity, and the condemnor's witnesses speak in terms of value of property.

Federal-Aid Highway Act of 1968, 23 U.S.C. §§ 101 *et seq.* (1970). Law of July 1, 1970, ch. 440, preamble, [1970] Gen. Laws Miss. 613 (repealed 1972). That program applied only to the state highway department; it has now been repealed and superseded by the Real Property Acquisitions Policies Law, which became effective July 1, 1972. MISS. CODE ANN. §§ 43-37-1 to -13 (Supp. 1973).

[37] Letter from Glenn Calloway, Chief of Right of Way Division, Mississippi State Highway Department, to Thomas R. Jones, July 17, 1974.

[38] MISS. CODE ANN. § 43-39-25 (Supp. 1973) provides:

> Any person or business concern aggrieved by a final administration determination concerning eligibility for relocation payments authorized by this chapter shall have the right of appeal to the court that would have had jurisdiction if the cause were in eminent domain from such decision at any time within twenty (20) days after actual notice to the aggrieved party. The appeal shall be heard the same as provided by law in eminent domain causes. Nothing in this chapter shall prohibit any aggrieved party from exercising any right or remedy available to him under state law with respect to any action of a state agency in carrying out this chapter.

Under the former Relocation Assistance Program Act, which has now been superseded, landowners desiring to appeal from an administrative decision could do so de novo to the court which would have had jurisdiction of the eminent domain proceeding. Law of July 1, 1970, ch. 440, § 9, [1970] Gen. Laws Miss. 617 (repealed 1972). In Mississippi State Highway Commission v. Rives, 271 So. 2d 725 (Miss. 1972), the court interpreted that provision of the Relocation Act; it was held that a landowner could offer evidence of relocation expenses during the trial of the case. *Id.* at 728. The results achieved in *Rives* will probably not be reached under the new Relocation Act, because its appeal provision omits the right of an appeal de novo. *See* MISS. CODE ANN. § 43-39-25 (Supp. 1973). The legislature has thus indicated that appeals from administrative awards, if desired, will be on the record, rather than before a jury. It is submitted that this will result in a much more orderly trial and will permit the fair market value test (the before and after rule) to be accorded its proper treatment.

[39] *See* 6A SACKMAN, NICHOLS ON EMINENT DOMAIN, *supra* note 6, § 34.3, at 34-50 (1972).

Are we ready to allow these relocation acts to compensate owners for losses over and above the judicial understanding of just compensation?[40] If so, the time is indeed ripe for understanding that under the market value standard certain damages are not legally cognizable and are *damnum absque injuria.*

II. NONCOMPENSABLE DAMAGES

In a transaction between a real buyer and seller, many factors influence price. Some of these factors, however, are not judicially recognized and must be excluded from consideration in eminent domain proceedings.[41] While an owner may give full consideration to sentimental value in establishing his sale price, no "willing purchaser" would do so.[42] The same is true of an owner's reluctance to part with his property.[43] These two factors are recognized as noncompensable; it is apparent that they have nothing to do with the value of the property condemned.[44] However, other logically noncompensable factors have hidden behind an all too literal application of "market value."

The generally accepted definition of market value in Mississippi is "the price which [property] will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it."[45] This definition has been taken by our court as implying that all factors a willing buyer would consider in establishing the sale price can be considered by a jury in its determination of due compensation.[46] The application of the definition, more than the definition itself, seems to cause the problems which have been encountered in condemnation cases. Both the buyer and seller are purely hypothetical in condemnation proceedings, and therefore each gives recognition only to transferable values, that is, those that can be sold and

---

[40] The state relocation act refers to "additives" to market value. MISS. CODE ANN. § 43-39-27 (Supp. 1973). Thus, this legislative enactment recognizes that market value does not include relocation, moving and other expenses over and above the reduction in value to the landowner's property. *See also id.* § 43-37-13.

[41] Sackman, *Avoiding Costly Errors, supra* note 7, at 228.

[42] *See* Mississippi State Highway Comm'n v. Windham, 241 Miss. 1, 128 So. 2d 577 (1961) (landowner not permitted to testify as to any sentimental value which the property had to him).

[43] United States v. Smith, 355 F.2d 807 (5th Cir. 1966).

[44] It has been the author's personal experience in the trial of eminent domain cases that, while such elements are legally noncompensable, the jury practice of "splitting the difference" often compensates for the exclusion of such elements.

[45] Mississippi State Highway Comm'n v. Hillman, 189 Miss. 850, 869, 198 So. 565, 571 (1940).

[46] Mississippi State Highway Comm'n v. Stout, 242 Miss. 208, 134 So. 2d 467 (1961); Wheeler v. Mississippi State Highway Comm'n, 212 Miss. 606, 55 So. 2d 225 (1951).

bought.[47] Such an objective purchaser is unwilling to pay for that which he cannot receive, such as moving expenses that may be incurred by the seller in the process of vacating the property. Such noncompensable items of damages can be classified as either direct damages or consequential damages.

A. Direct Damages

1. Personal Property Value

As a general proposition all property, tangible or intangible, is subject to condemnation.[48] In practice, the condemnation power is exercised almost exclusively for the acquisition of real property. When personal property is located upon the real property acquired, only that property described in the condemnor's petition is condemned; personal property located thereon remains the landowner's. For that reason, and because such personal property adds nothing to the market value of the real property that is the true object of the condemnation proceeding, no consideration may be given the value of the personal property.[49] The logic and correctness of this rule is obvious. To do otherwise would be to compensate for items of value that cannot become the property of the condemnor. Furthermore, such an allowance would tend to compensate the owner for the value of the particular use that he has made of the property; this special use is in no way related to the value on the open market.

2. Cost of Removing Personal Property

Most jurisdictions follow the rule that an owner is not entitled to recover the cost of removing personal property because such losses are not a taking of the real property.[50] However, since its ruling in *Mississippi State Highway Commission v. Rogers,*[51] our court has admitted testimony regarding moving expenses, not as a separate item of

---

[47] This concept is not dissimilar to the "reasonable and prudent man" of tort law; he is merely put into the real estate business. Rollins, *supra* note 15, at 43.

[48] *See generally* 29A C.J.S. *Eminent Domain* § 65, at 311 (1965).

[49] 4 SACKMAN, NICHOLS ON EMINENT DOMAIN, *supra* note 6, § 13.13.

[50] *See generally id.* § 14.2471(2), at 14-294; Annot., 69 A.L.R.2d 1453 (1960). In 1 ORGEL, *supra* note 6, § 68, at 305-06, the author states:

> The mere fact that the particular owner who transfers his premises to someone else must incur considerable outlays in moving his valuables to another location, while it has a decided effect on the value of these premises to *himself*, has no perceptible bearing on their market value. A court would, therefore, have to disregard these expenditures if it accepted market value of compensation.

[51] 242 Miss. 439, 136 So. 2d 216 (1961).

damages, but so that "the jury in their considerations may estimate the before value and the after value."[52] Analysis of this statement demonstrates its unsoundness: no "willing purchaser" would pay an additional sum to aid the seller in removing personal property. The personalty does not relate to what is being received by the purchaser. The Mississippi rule apparently stems from the court's unwillingness to accept the proposition that an owner is not always made whole in such litigation unless a pure indemnity approach is used in lieu of "fair market value."

The new relocation acts will, at least in federal and federally assisted programs,[53] solve this problem and make funds available for such expenses. This should allow our court to abandon the strained ruling which was announced in *Rogers* and followed in other recent cases.[54]

3. Business Loss

Decisions, such as *Rogers,* which permit the recovery of damages clearly unrelated to the property are difficult to reconcile with cases such as *Mississippi State Highway Commission v. Ladner.*[55] The *Ladner* court gave clear recognition to the fact that a business loss, even though caused by the condemnation, was not a proper element of damages and stated that some pecuniary injuries may be inflicted without compensation. The court quoted with approval language which makes plain that the word "property" is not always to be applied in its broadest sense and that some less tangible property rights, such as loss of profits, are not absolutely protected by the constitution.[56] Relying on an earlier decision,[57] the court held that fair market value refers to the *value of the land itself,* and not profits derived therefrom. The court made an important distinction: fair market value encompasses only the land itself. It is difficult to understand how other decisions of the court drift into an indemnity approach to valuation, by which actual injury to the

---

[52] *Id.* at 445, 136 So. 2d at 218.

[53] 4A SACKMAN, NICHOLS ON EMINENT DOMAIN, *supra* note 6, § 14.2471(4), at 14-322. *See* text accompanying notes 34 through 39 *supra.*

[54] Mississippi State Highway Comm'n v. McArn, 246 So. 2d 512 (Miss. 1971); Mississippi State Highway Comm'n v. Central Land & Rental Corp., 239 So. 2d 335 (Miss. 1970).

[55] 243 Miss. 139, 137 So. 2d 791 (1962) (loss of profits from a business held noncompensable). *See also* Mississippi State Highway Comm'n v. Central Land & Rental Corp., 239 So. 2d 335, 338 (Miss. 1970) (reversed, in part, because of instruction permitting the jury to consider "increased costs of operation after moving" as well as loss of profits—neither are proper elements of damages in condemnation proceedings); Mississippi State Highway Comm'n v. McCardle, 243 Miss. 111, 137 So. 2d 793 (1962).

[56] 243 Miss. at 145, 137 So. 2d at 793.

[57] Mississippi State Highway Comm'n v. Valentine, 239 Miss. 890, 124 So. 2d 690 (1960).

landowner replaces the concept of damage to the *land*.[58] The distinction, though subtle, is important, especially since the "before and after" rule gives consideration only to the value of the property condemned.

When income is derived from the intrinsic nature of the property itself, rather than from a business conducted on the property, such evidence is considered material insofar as it relates to the fair market value of the property.[59] However, as one author states:

> In the light of the modern judicial trend liberalizing the rules of damages in order to make the owner whole, it has been held in several jurisdictions that where in the business affected, there is a rule of thumb utilized whereby rental is related to the volume of business (as in the case of service stations, where rental is fixed on the basis of so many cents for each gallon of gas pumped), income from the business may be considered as one of the criteria of value of the land. This is by no means the common rule; the majority rule by far rejects such item as a criterion of value.[60]

In some instances appraisers will resort to a so-called land residual technique to determine land value in condemnation proceedings.[61] This technique is valid but can be used only when building or land values are unknown and cannot be estimated separately on a reasonable basis. Care must be taken to distinguish between potential rent and existing rent,[62] particularly when the potential rent is derived from a hypothetical structure that is to be erected in the future.[63] An appraisal witness cannot place a hypothetical structure on a barren parcel of land and testify as to a potential rent that could be derived from the hypothetical

---

[58] Mississippi State Highway Comm'n v. Rives, 271 So. 2d 725 (Miss. 1972); Mississippi State Highway Comm'n v. McArn, 246 So. 2d 512 (Miss. 1971).

[59] 5 SACKMAN, NICHOLS ON EMINENT DOMAIN, *supra* note 6, § 19.1(1), at 19-2. The author makes the point that a distinction "must be drawn between income as a *criterion* of value and income as *evidence* of value." *Id.*

[60] Sackman, *Avoiding Costly Errors, supra* note 7, at 234.

[61] SPECIAL TECHNICAL COMM. OF THE EDUCATION COMM. AMERICAN INST. OF REAL ESTATE APPRAISERS, THE APPRAISAL OF REAL ESTATE 287-89 (5th ed. 1967) [hereinafter cited as REAL ESTATE APPRAISAL].

[62] The land residual technique is explained as follows:

> These residual techniques are really mathematical procedures which enable the appraiser to use certain known factors to find the unknowns. In the land residual technique, for instance, the known or assumed factors are net income before recapture, building value, interest rate, and the useful life of the building; the unknown or residual factor is the land value.
>
> The general purpose of the residual techniques is to estimate the value of a property when the land or building values are unknown and cannot be estimated separately on a reasonable and convincing basis.

Id. at 289.

[63] *See* 4 SACKMAN, NICHOLS ON EMINENT DOMAIN, *supra* note 6, § 12.3121[3].

structure.[64] It is permissible, however, to consider existing rent from an actual structure located on the land.[65]

4. Special Value to Owner

Often an owner will take the position that his land has special value to him. The courts generally have rejected such contentions when the market value of the property is ascertainable. Indeed, the Supreme Court has held that market value represents the maximum which the owner may recover.[66]

There are instances, however, where property does not have a market value as that term is commonly used.[67] When it is demonstrated that property has special value only for its owner and has no value for anyone other than the owner, consideration may be given to that value which it has for the owner.[68]

5. Value Enhanced by Project

Usually a public project is developed over a period of months or even years. The lapse of time between the announcement of the project and the acquisition of necessary land creates problems in determining the value for which an owner must be compensated. Frequently an owner argues that his property has been enhanced by the forthcoming project. The general rule set out in *United States v. Miller*[69] is that any enhancement in value due to a proposed public improvement is to be excluded in determining the market value of the land. Mississippi does not follow the general rule. In *Pearl River Valley Water Supply District v. Brown,*[70] the court held:

> The agency exercising the extraordinary power of eminent domain cannot complain that the property has increased in value because of a

---

[64] Sackman, *Avoiding Costly Errors, supra* note 7, at 235.

[65] State v. Bare, 141 Mont. 288, 377 P.2d 357 (1962).

[66] United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 80 (1913).

[67] Housing Authority v. Kosydor, 17 Ill. 2d 602, 162 N.E.2d 357 (1959); State Dep't of Highways v. Ouachita Parish School Bd., 162 So. 2d 397 (La. Ct. App. 1964); 4 SACKMAN, NICHOLS ON EMINENT DOMAIN, *supra* note 6, § 12.32.

[68] Mobile & O. R.R. v. Postal Tel. Cable Co., 76 Miss. 731, 26 So. 370 (1899).

In Baker v. Mississippi State Highway Commission, 204 Miss. 167, 37 So. 2d 169 (1948), the court considered the damage rules promulgated in Mississippi since the adoption of section 17 of the constitution of 1890. Justice Roberd's opinion concluded with a restatement of the variations of the rules to be utilized in eminent domain proceedings. 204 Miss. at 179-80, 37 So. 2d at 172.

[69] 317 U.S. 369, 377 (1943); *see* 4 SACKMAN, NICHOLS ON EMINENT DOMAIN, *supra* note 6, § 12.3151, at 12-293, 12-299.

[70] 254 Miss. 685, 182 So. 2d 384 (1966).

> proposed public project, until it actually files a petition to take the land by eminent domain proceeding.[71]

The court went on to say that since the filing date of the petition was the date when the fair market value of the property was to be determined, the landowner was not entitled to show any increased value of the property after that date.[72]

The above are the direct damages most commonly asserted by landowners as having an effect on property values. They generally are rejected notwithstanding that they often have a real effect on the owners themselves and on the value of the property involved.

B. Consequential Damages

As with direct damages, the most important consideration is not whether consequential damages are real, but whether they are legally cognizable. Since the Mississippi constitution[73] requires compensation for both taking and damaging, it is immaterial whether the damage occurs by reason of the taking or by reason of the existence of the public improvement itself. The distinction is important only in those states that have only a "taking" provision,[74] as does the United States Constitution.[75]

In Mississippi the term "consequential damages" refers to damages to the remainder of an owner's property as a result of the taking of another portion.[76] It is within this use of the term that claims are regularly made but rejected by the courts as noncompensable.

1. Diversion of Traffic

Extensive highway programs in Mississippi have resulted in the

---

[71] *Id.* at 693, 182 So. 2d at 386-87. *See also* Paulk v. Housing Authority, 204 So. 2d 153 (Miss. 1967). In *Paulk,* urban renewal plans which had been approved by the housing authority prior to the commencement of the condemnation proceeding resulted in a rezoning of the property. It was held that the urban renewal plans were a proper item of evidence relating to market value.

[72] 254 Miss. at 695, 182 So. 2d at 387.

[73] MISS. CONST. art. 3, § 17.

[74] 1 ORGEL, *supra* note 6, § 54, at 253-55; 4A SACKMAN, NICHOLS ON EMINENT DOMAIN, *supra* note 6, § 14.1(1), at 14-16.

[75] U.S. CONST. amend. V.

[76] City of Vicksburg v. Herman, 72 Miss. 211, 16 So. 434 (1894). Referring to the "damage" provision inserted in the constitution of 1890, the court said:

> The citizen must now be held, under this new provision of our fundamental law, to be entitled to due compensation for, not the taking, only, of his property for public use, but for all damages to his property that may result from works for public use.

72 Miss. at 215, 16 So. at 435.

construction of many new roads. A current program provides for so-called "bypass" roads around towns and cities rather than directly through the communities. As a result, businesses which relied heavily on their high-traffic density locations are theoretically damaged by the bypasses. Often the new roads are limited-access roads built on the rear portion of a store owner's property. From the owner's viewpoint, not only has he lost a portion of his property for the new road, but he has suffered further loss due to the decrease in the business value of the remainder of his property. Naturally, the landowner will assert this element as a compensable claim in a condemnation proceeding. This diversion of traffic almost unanimously has been held to be noncompensable.[77] In *Morris v. Mississippi State Highway Commission,*[78] the court held that an abutting property owner has no right to the continuation of the flow of traffic past his property and that reduction in value to the business occasioned by the construction of a new road which diverts the flow of traffic past the property merits no compensation.[79] The court reasoned that such changes are made by virtue of the exercise of the police power and do not constitute a taking or damaging of a property right. The court also commented that when a landowner improves property fronting on a highway, he assumes the risk that a new road will be built. The court found, however, that the existing road would not be changed and, therefore, the landowner's access was not impaired or destroyed in any way.[80]

2. Altering Access

Another frequent situation is the conversion of a conventional highway into a limited-access facility. As a result, preexisting rights of access to the main road are eliminated and access rights to a service or frontage road are substituted.

One of the first Mississippi cases involving this factual situation was *Muse v. Mississippi Highway Commission.*[81] A four-lane facility was originally planned when the land was acquired by the condemnor. Only two lanes were actually built and the highway commission changed the

---

[77] *See, e.g.,* Hempstead County v. Huddleston, 182 Ark. 276, 31 S.W.2d 300 (1930); Blumenstein v. City of Long Beach, 143 Cal. App. 2d 264, 299 P.2d 347 (Dist. Ct. App. 1956); Hendrickson v. State, 267 Minn. 436, 127 N.W.2d 165 (1964); Board of County Comm'rs v. Slaughter, 49 N.M. 141, 158 P.2d 859 (1945). *See generally* 4A SACKMAN, NICHOLS ON EMINENT DOMAIN, *supra* note 6, § 14.244[4].

[78] 240 Miss. 783, 129 So. 2d 367 (1961). *See also* 4A SACKMAN, NICHOLS ON EMINENT DOMAIN, *supra* note 6, § 14.244[4], at 14-227.

[79] 240 Miss. at 789, 129 So. 2d at 369.

[80] *Id.* at 792-93, 129 So. 2d at 371.

[81] 233 Miss. 694, 103 So. 2d 839 (1958).

plans to provide not only for the two additional lanes of main flow traffic but also for service roads on the outer edges of the four principal lanes. The court found that the before-and-after market value test was the proper method to use in order to arrive at an award for the landowner. However, the court approved instructions requested by the condemnor authorizing the jury to find that the owner was not damaged by the taking of the right of direct access to the main lanes of the highway, if the jury believed that the frontage roads afforded "reasonable" access to the remaining property of the owner. It appeared that in Mississippi the test was one of "reasonableness."

In cases decided subsequent to *Muse,* however, our court gave no indication that it was following a test of "reasonableness."[82] Some of these decisions indicate that the court now views any interference with the right of direct access to a main highway as compensable, notwithstanding the substitution of "reasonable" access.[83] There are indications, however, that the court will unequivocably adopt the "reasonableness" test which will allow a jury to determine, on the basis of facts presented, whether the owner will have reasonable access to a public road.[84]

3. Frustration of Plans

In the trial of a case an owner may testify that he had certain plans for the property and that those plans cannot be carried out because of the condemnation. The frustrations of the landowner are not compensable, and such testimony should not be admitted.[85] As stated by an outstanding scholar in the field of eminent domain:

> The measure of damages does not include any special damages suffered through frustration of the owner's plans. The rule of exclusion has been applied even when special damages, in the nature of a penalty, are specifically incurred by the owner as a result of a contractual obligation.[86]

---

[82] Mississippi State Highway Comm'n v. Ray, 215 So. 2d 569 (Miss. 1968); Mississippi State Highway Comm'n v. Null, 210 So. 2d 661 (Miss. 1968); Mississippi State Highway Comm'n v. Finch, 237 Miss. 314, 114 So. 2d 673 (1959).

[83] Mississippi State Highway Comm'n v. Null, 210 So. 2d 661 (Miss. 1968); Mississippi State Highway Comm'n v. Finch, 237 Miss. 314, 114 So. 2d 673 (1959).

[84] Mississippi State Highway Comm'n v. Finch, 237 Miss. 313, 114 So. 2d 673 (1959); *see* Annot., 42 A.L.R.3d 13 (1972).

[85] *See, e.g.,* United States v. An Easement & Right of Way 100 Feet Wide, 447 F.2d 1317 (6th Cir. 1971); San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App. 2d 472, 14 Cal. Rptr. 899 (Dist. Ct. App. 1961); McGill v. City of Stroud, 492 P.2d 1094 (Okla. 1971).

[86] 4A SACKMAN, NICHOLS ON EMINENT DOMAIN, *supra* note 6, § 14.241[4], at 14-165 to -166.

4. Use Other Than Present Use

Occasionally a landowner contends that the highest and best use of his property is not the use being made of it on the date the petition of condemnation was filed. This may be a valid contention. Before the value of a use of the property other than the present use can be considered, certain showings must be made: (1) That the proposed use is not speculative; (2) that there is some probability that the proposed use would occur within a reasonable time; and (3) that there is a present demand for the land for such use or a reasonable expectation of such demand in the near future.[87] In the absence of these prerequisites, testimony as to the value of the property for a use other than its present use is not admissible.[88]

One contention frequently advanced by Mississippi landowners is that land should be appraised, not as a single tract, but rather as separate lots of a potential subdivision. The court considered this issue in *Mississippi State Highway Commission v. Duckworth*[89] and held that if the property is suitable for a subdivision, the value allowed is that of the entire tract for such purpose, and not the value of each of the proposed lots in the potential subdivision. A contrary holding would ignore the time required to find buyers for each of the lots and the "single buyer" aspect required by the "before and after" rule.[90]

5. Temporary Interference

If property continues to be used for business purposes during the construction of a public project, the temporary blockade of a street or highway is not a compensable injury, even though access might be rendered difficult and inconvenient.[91]

---

[87] Mississippi State Highway Comm'n v. Brooks, 239 Miss. 308, 123 So. 2d 423 (1960); Mississippi State Highway Comm'n v. Brown, 176 Miss. 23, 168 So. 277 (1936). *See also* Pearl River Water Supply Dist. v. Brown, 254 Miss. 685, 182 So. 2d 384 (1966).

[88] Cameron Dev. Co. v. United States, 145 F.2d 209 (5th Cir. 1941).

[89] 203 So. 2d 591 (Miss. 1967).

[90] *See* State v. Malecker, 265 Minn. 1, 120 N.W.2d 36 (1963), where the court stated:

> Market value is not to be determined by a myriad of separate transactions where there are numerous buyers negotiating for the purchase of individual lots over a long period of time. What we are concerned with is the price which an individual purchaser would pay for the entire tract in a single transaction, without concerning the jury with all of the uncertain costs of advertising, brokers' commissions, taxes, utilities, grading, and improvements which a protracted lot-by-lot sales campaign would inevitably require.

120 N.W.2d at 40. *See also* Annot., 6 A.L.R.2d 1197 (1949), for a thorough discussion of this question.

[91] Thompson v. City of Mobile, 240 Ala. 523, 199 So. 862 (1941). *See generally* 26 AM. JUR. 2d *Eminent Domain* § 167, at 840 (1966).

6. Speculative or Remote Damages

Damages must sometimes be rejected because they are too speculative, contingent, or remote to affect market value on the date the condemnation petition is filed. Likewise, a reduction in value to the remainder of the land, based on unfounded fears, is noncompensable.[92] The test continues to be that of fair market value,[93] but if it can be proved that existing apprehension is not speculative or unreasonable and does indeed affect the value of the property, consideration may be given to it.

III. Pyramiding Damages

Another category consists of legitimate appraisal practices that are commonly misunderstood and misused in eminent domain appraisals. The misuse generally results in a pyramiding of damages or at best a misleading inflationary property value.

A. Original Costs vs. Market Value

Frequently an appraiser uses the owner's original cost of the property and improvements in order to begin his appraisal. This is a proper foundation provided the original cost accurately reflected the market value of the property at that time. This proposition was recognized in *Mississippi State Highway Commission v. Taylor,*[94] where the court held that a landowner's statement regarding expenditures was inadmissible absent supporting evidence of the costs of those improvements and of their enhancement of the property.[95]

When original cost is utilized in ascertaining the value of the land, the condemnor is not required to "underwrite an owner's bad investment of an excessive sum nor is the condemnor entitled to benefit by the fact that the the owner made a good 'buy.' "[96] It is the property, not

---

One text writer states:

> This rule is hard to defend on principle. But the impossibility of constructing a subway or sewer or laying a water-pipe in the streets of the business section of the city without in some degree interfering with access to abutting property, and the consequent danger of a multiplicity of suits from the determination of which it might be impossible as a practical matter to exclude mere damage to business, have led the courts to reject claims of this character as a matter of public necessity.

2A Sackman, Nichols on Eminent Domain, *supra* note 6, § 6.4442[2], at 6-251 to -52.

[92] *See* Yazoo & M.V.R.R. v. Jennings, 90 Miss. 93, 43 So. 469 (1907), for examples of highly speculative damages.

[93] 1 Orgel, *supra* note 6, § 61, at 276; 4A Sackman, Nichols on Eminent Domain, *supra* note 6, § 14.241[1], at 14-158.

[94] 240 Miss. 1, 124 So. 2d 684 (1960).

[95] *Id.* at 5, 124 So. 2d at 686.

[96] Sackman, *Avoiding Costly Errors, supra* note 7, at 238. It has also been correctly stated that:

the investment, for which the landowner is to receive compensation.

B. *Unity of Use*

Mississippi follows the "unity of use" rule.[97] When one parcel of land is taken, the owner cannot recover for injury to a separate and independent parcel of land in the same neighborhood unless the two parcels are used together and both are substantially necessary for the use of each.[98] However, if unity of use can be established, the owner may recover for damage to both parcels. The burden to prove such unity is on the landowner.

C. *Cost to Cure*

Owners and their appraisers frequently offer testimony concerning the cost of restoring a part or all of the remaining property to a condition similar to that prior to the taking of a portion. The proposed restoration may range from the building of bridges to the paving of roads. Appraisers commonly refer to this estimated expense as the "cost to cure," a concept which is not itself misleading. However, when the cost to cure is combined with damages which represent a reduction in value of the remaining land, the damages have been pyramided.[99] The standard should be the decrease in market value of the remaining land, or the "after" value, as opposed to the amount of money necessary to restore the land to its former status. Should the cost to cure exceed the reduction in market value of the remaining land, that approach to value is not available to a landowner. The underlying rationale of this principle was announced in *Baker v. Mississippi State Highway Commission.*[100] The court recognized that "cost to cure" might exceed the fair market value of the property itself, holding that testimony can be considered only as it relates to the before-and-after rule. Thus, if the problem can be cured by the expenditure of a lesser sum, there will not be any reduction in value of the property which will support any additional award.[101]

> Market value is not equivalent to the amount expended for the property by the owner; nor is "book value" equivalent to market value . . . . A fortiori, cost of land and cost of improvements taken separately and added together are not to be equated with fair market value.

5 SACKMAN, NICHOLS ON EMINENT DOMAIN, *supra* note 6, § 20.1, at 20-2 to -3 (rev. 3d ed. 1969) (footnotes omitted).

[97] Swett v. Mississippi State Highway Comm'n, 193 So. 2d 596 (Miss. 1967); Mississippi State Highway Comm'n v. Dodson, 207 Miss. 229, 42 So. 2d 179 (1949).

[98] Sackman, *Rule of Joinder—Valuation and Severance Damages,* in 2 CONDEMNATION APPRAISAL PRACTICE 175 (American Institute of Real Estate Appraisers 1973).

[99] Young v. Tennessee Gas & Transmission Co., 367 S.W.2d 270 (Ky. Ct. App. 1963).

[100] 204 Miss. 166, 37 So. 2d 169 (1948).

[101] In *Baker* the grade of the highway, as it traversed the front of the landowner's

D. Cost Reproduction

While the market data or comparable sales approach to value is perhaps the most readily understood by courts and juries, occasionally it is necessary to use a cost approach to obtain current value.[102] The appraiser or a construction expert using this approach determines the present cost of replacing the improvements with as nearly an exact replica as possible. Before evidence can be admitted concerning the reproduction cost of the improvement, it must be established that the improvements are reasonably adapted to the land.[103] There must also be evidence that the depreciated value of the improvements adds to the value of the whole property by the amount of their depreciated value.[104]

One problem in using the reproduction cost approach is that use of the property normally establishes its maximum value.[105] This value is often mistakenly used as the measure of damages itself.[106] Our court recognized this problem without fully amplifying it in *Mississippi State Highway Commission v. Hudgins*.[107]

E. Mutually Exclusive Uses

The practice of requiring both the condemnor and the owner to file

---

business, was raised. The landowner contended that the applicable rule of damages was the amount necessary to restore the property to its former condition so as to place the property in the same accessible condition to the highway that existed prior to the raising of the road by the highway department. The court rejected the landowner's contention, finding that the cost of replacement would exceed the fair market value of the land. The court further stated:

> [T]he cost of remedying the situation to bring the property as near as [possible] to its former usable condition is competent—not as a separate, independent foundation for a verdict but only as bearing upon and as tending to establish the true value shown by the evidence adduced under [the before and after rule].

Id. at 180, 37 So. 2d at 172. *See also* 4A SACKMAN, NICHOLS ON EMINENT DOMAIN, *supra* note 6, § 14.22, at 14-75 (cost to cure can be considered as a measure of damage only when that amount is less than the decrease in the market value of the property if left as it stood); 5 *id.* § 23.2, at 23-19 to -20.

[102] *See* REAL ESTATE APPRAISAL, *supra* note 61, at 180-84.

[103] 5 SACKMAN, NICHOLS ON EMINENT DOMAIN, *supra* note 6, § 20.2[1], at 20-13.

[104] Bishop, *Examination and Cross-Examination in Condemnation Cases*, in PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 237 (Southwestern Legal Foundation 1971).

[105] REAL ESTATE APPRAISAL, *supra* note 61, at 61.

[106] *See* 5 SACKMAN, NICHOLS ON EMINENT DOMAIN, *supra* note 6, § 20.2[1], at 20-19 to -21.

[107] 182 Miss. 518, 181 So. 719 (1938) (trial court permitted testimony regarding replacement costs solely for the purpose of assisting the jury in arriving at the present market value of the land).

a statement of value[108] including the "highest and best use of the property" brings into focus the use factor of the property insofar as value is concerned. Although the most valuable use may be considered,[109] value cannot be based on adding together mutually exclusive or inconsistent uses of the property.[110] For example, if the highest and best use of the property being condemned is found to be commercial, the award cannot include an additional sum for residential structures located on the land. The residential structures add nothing to the commercial value of the land and will have to be removed from the property in order to permit the use of the land for commercial purposes.[111] The use of the property for commercial purposes excludes the simultaneous use of the property for residential purposes.[112] If compensation for mutually exclusive uses were allowed, a landowner would be getting the sum of the value of his land for separate exclusive uses.[113]

F. Value of Whole Land vs. Components

Sometimes condemned property includes sand, gravel, lime, or other mineral deposits or growing crops or trees. The temptation is strong to place a separate value on such components in reaching the

---

[108] MISS. CODE ANN. § 11-27-7 (1972).

[109] *See* Mississippi State Highway Comm'n v. Wagley, 231 So. 2d 507 (Miss. 1970); Mississippi Power Co. v. Head, 218 So. 2d 24 (Miss. 1968); Mississippi State Highway Comm'n v. Saulters, 195 So. 2d 505 (Miss. 1967); Mississippi State Highway Comm'n v. Tisdale, 241 Miss. 16, 128 So. 2d 745 (1961); Mississippi State Highway Comm'n v. Brooks, 239 Miss. 308, 123 So. 2d 423 (1960).

[110] United States v. Certain Lands, 51 F. Supp. 66 (S.D.N.Y. 1943) (if land were used for mining iron ore, there would be no market for the property as a camp site or as a domestic water supply); Housing Authority v. Alman, 250 Ark. 581, 466 S.W.2d 266 (1971) (improper for landowner's appraisal witness to add value of residential improvements to value of land which was valued on a present, highest, and best use for commercial purposes); Gentile v. Ives, 159 Conn. 443, 270 A.2d 680 (1970) (no error committed by referee for failing to assign any value on house and shed when property is valued on a basis of a highest and best use for commercial purposes); Commonwealth v. Tabor, 402 S.W.2d 434 (Ky. 1966) (damages are doubled when the property is valued for a commercial use and an additional sum is added thereto for residential improvements); Acme Theatres, Inc. v. State, 26 N.Y.2d 385, 258 N.E.2d 912, 310 N.Y.S.2d 496 (1970) (damages cannot be awarded for improvements that must be demolished in order to use the land for its highest and best use).

[111] *See generally* 1 ORGEL, *supra* note 6, § 28; 4 SACKMAN, NICHOLS ON EMINENT DOMAIN, *supra* note 6, at § 12.314.

[112] *See, e.g.*, Housing Authority v. Alman, 250 Ark. 581, 466 S.W.2d 266 (1971); Commonwealth v. Tabor, 402 S.W.2d 434 (Ky. 1966); Acme Theatres, Inc. v. State, 26 N.Y.2d 385, 258 N.E.2d 912, 310 N.Y.S.2d 496 (1970).

An excellent explanation of the rationale of the rule prohibiting the recovery of damages for inconsistent uses of the property can be found in State *ex rel.* Department of Highways v. Bernard, 271 So. 2d 303 (La. Ct. App. 1972).

[113] 1 ORGEL, *supra* note 6, § 28, at 138 n.110.

value of the entire tract of land. Appraisal witnesses for the landowner may desire to employ a process by which the quantity of the minerals underlying the land is multiplied by a unit price of the material. The product derived from the multiplication process is then added to the value of the "bare" land itself, and that sum is used as the fair market value of the land. Sometimes, the product achieved from the multiplication process alone is used as the value of property.[114] It is generally held improper to use such a method, because the land is to be valued as a whole, with the factor of mineral deposits or growing crops or timber being given *due consideration* in ascertaining the overall value.[115] Market value of the land, with all of its components, is the proper test.[116]

Giving "due consideration" to the existence of mineral deposits apparently means that evidence may be shown as to the quantity and quality of the material underlying the land.[117] Before any consideration may be accorded to the mineral deposits, it must be shown that there is a market for the material and the quantity is adequate for commercial extraction.[118] Additionally, the commercial extraction of the mineral deposits must not be inconsistent with the highest and best use of the property.[119]

Our court addressed itself to this problem in *Mississippi State Highway Commission v. Wear*.[120] The court adopted the general rule that mineral deposits cannot be determined independently of the land. The deposits cannot be evaluated as potential merchandise; rather the

---

[114] *See, e.g.,* State v. Certain Land, 200 A.2d 241 (Del. Super. Ct. 1964); Reiter v. State Highway Comm'n, 177 Kan. 683, 281 P.2d 1080 (1955); State *ex rel.* Department of Highways v. Hart, 249 So. 2d 310 (La. Ct. App. 1971); Knox Lime Co. v. Maine State Highway Comm'n, 230 A.2d 814 (Me. 1967); Mississippi State Highway Comm'n v. Wear, 252 Miss. 516, 175 So. 2d 508 (1965); Werner v. Commonwealth, 432 Pa. 280, 247 A.2d 444 (1968); Whitenight v. Commonwealth, 1 Pa. Cmwlth. 144, 273 A.2d 752 (Pa. Cmwlth. Ct. 1971); State v. Hobart, 5 Wash. App. 2d 469, 487 P.2d 635 (1971). *See generally* Annot., 156 A.L.R. 1416 (1945).

[115] *See generally* Annot., 156 A.L.R. 1416 (1945).

[116] *See generally* 29A C.J.S. *Eminent Domain* § 174 (1965); 4 SACKMAN, NICHOLS ON EMINENT DOMAIN, *supra* note 6, § 13.22.

Some courts have had a difficult time in applying this general rule which, on the surface, appears very simple. A good illustration of this difficulty is State v. Noble, 8 Utah 2d 405, 335 P.2d 831 (1959).

[117] Reiter v. State Highway Comm'n, 177 Kan. 683, 281 P.2d 1080 (1955); *see* 4 SACKMAN, NICHOLS ON EMINENT DOMAIN, *supra* note 6, § 13.22.

[118] Cameron Dev. Co. v. United States, 145 F.2d 209 (5th Cir. 1944); 4 SACKMAN, NICHOLS ON EMINENT DOMAIN, *supra* note 6, § 13.22.

[119] *See, e.g.,* Mills v. United States, 363 F.2d 78 (8th Cir. 1966); Reiter v. State Highway Comm'n, 177 Kan. 683, 281 P.2d 1080 (1955); State v. Mottman Mercantile Co., 51 Wash. 2d 722, 321 P.2d 912 (1958); 4 SACKMAN, NICHOLS ON EMINENT DOMAIN, *supra* note 6, § 13.22.

[120] 252 Miss. 516, 175 So. 2d 508 (1965).

land must be taken and valued as land, with the factor of mineral deposits being given due consideration.[121] Further, the court stated that in determining just compensation, it is not permissible to aggregate the value of the land and the value of the mineral deposits.[122]

IV. How to Handle the Evidence

In many instances, the attempt to introduce improper evidence of the type discussed can be readily anticipated by analyzing the statement of values which must be filed several days prior to the trial.[123] However, such evidence often will be introduced into the trial without warning. A thorough cross-examination then will be necessary to identify the objectionable evidence. The condemnor's attorney must be prepared either to keep this evidence from the jury or at least to have it excluded from consideration after it has been heard.

The present Mississippi practice of requiring written statements of value to be filed in advance of the trial, wherein each party identifies the damages, affords ample opportunity to eliminate some objectionable evidence before it is ever offered.[124] Once heard by the jury, such evidence, even though the court subsequently finds it inadmissible, is practically impossible to erase from the minds of the jurors. Instructions to the jury often serve to emphasize a prejudicial point rather than minimizing it.

In those cases where prejudicial evidence is identified in advance of the trial, it is wise to seek its elimination by a motion *in limine*.[125] The motion should be in writing and should specify the prejudicial and inadmissible evidence. The advantage of the motion is that it prevents the jury's hearing the evidence at all. The disadvantage is that it may

---

[121] The interesting part of the *Wear* decision is that the opinion recites all of the correct law, yet the wrong decision appears to have been rendered in the case, based on the facts set forth in the opinion. It may very well be that some of the pertinent facts were omitted from the reported decision.

[122] Even the early case of Mississippi State Highway Comm'n v. Hillman, 189 Miss. 850, 198 So. 565 (1940), recognized that:

> [C]ompensation to be awarded the owner of land taken "should be estimated for the land as land, and not for the materials which compose it," . . . and the term "land" embraces its natural products growing thereon, e.g. trees . . . . Consequently, the value of these trees does not constitute a separate item of damage to the appellees, but was for consideration by the jury only in arriving at the value of the land on which they were.

Id. at 871, 198 So. at 571.

[123] *See* Miss. Code Ann. § 11-27-7 (1972).

[124] *Id.*

[125] Kromzer, *Advantages to Be Gained by Trial Motions for the Plaintiff,* in J. Kennelly & J. Chapman, The Trial Lawyers Guide 350 (1963). There it is noted that such motions are designated or classified as motions *in limine* or motions to suppress.

well educate opposing witnesses, who will maintain their same opinions as to value but will alter the identity of the objectional damages in name only.[126]

Another method of keeping such evidence from the jury is to request the court, prior to allowing the witness to state his opinion of value, for permission to *voir dire* as to the basis for his opinion. This approach is permissible in the examination of an expert or opinion witness.[127] The procedure, utilized when a witness, on direct examination, is using an improper value approach or has included noncompensable items of damage in his opinion, is explained extensively in *Davis v. Pennsylvania Railroad*.[128]

Other than an objection, the method used most often to exclude such improper evidence is a motion to exclude. These motions are made either at the conclusion of the direct testimony of the witness or after his cross-examination. Our court has noted that there are occasions when it is not clear until the conclusion of the witness' cross-examination that his testimony is improper.[129] Motions to exclude vary in their breadth and depend upon the nature of the testimony itself. For example, if the witness had based his opinion wholly upon noncompensable items, a motion to exclude the entire testimony will be granted.[130] On the other hand, should his testimony contain impermissible elements of damage coupled with permissible elements, the motion should be directed only to the impermissible elements. In the latter situation, the witness' testimony should be allowed to stand as corrected by excluding the impermissible element, provided this element can be distinguished.[131] Our court, until recently, had taken the position that any

---

[126] The author's personal experience in requesting a trial judge to prohibit a condemnee from offering evidence identified by the statement of values as "$150,000.00 consequential damages—loss of business" was less than satisfactory. The trial court required a new name to be applied to the same amount of damages. Such experiences are more likely to occur with opinion witnesses than with fact witnesses.

[127] *See* 31 AM. JUR. 2d *Expert and Opinion Evidence* § 32, at 533 (1967).

[128] 215 Pa. 581, 64 A. 774 (1906).

[129] Mississippi State Highway Comm'n v. Day, 181 Miss. 708, 180 So. 794 (1938).

[130] People v. Giumarra Vineyards Corp., 245 Cal. App. 2d 309, 53 Cal. Rptr. 902 (Dist. Ct. App. 1966). There the court said: "And it is true that when cross-examination shows that testimony with respect to severance damages is based wholly upon noncompensable items a motion to strike such testimony should be granted." 53 Cal. Rptr. at 908. *See also* Boston Gas Co. v. Assessors of Boston, 334 Mass. 549, 137 N.E.2d 462 (1956) where it is stated:

> [T]he . . . rule is that where it is demonstrated during the testimony of an expert that his opinion rests wholly upon reasons which are legally incompetent, there is no right to have his opinion considered as evidence.

Id. at 579, 137 N.E.2d at 480.

[131] Arkansas State Highway Comm'n v. Wallace, 247 Ark. 157, 444 S.W.2d 685, 687

testimony containing impermissible elements of damage should be excluded.[132] However, in *Redevelopment Authority v. Holsomback,*[133] the court took the position that a motion to exclude must be directed solely to the objectionable portion of the witness' testimony. It now appears that such objections or motions should be directed only to the impermissible element of value which, if capable of separation, will be excluded.

CONCLUSION

This article will certainly be viewed by some as pro-condemnor. However, this apparent bias is not intended. As long as the fair market value rule is the standard used in this jurisdiction, its proper application will not accommodate damage or injury beyond that sustained by the *property* actually condemned. This result is not novel; it is a logical conclusion. If another result is desired, then a different standard should be applied.

The state of condemnation law in Mississippi is, to put it with restraint, confusing. In fairness it must be said that much of this confusion comes, not from the actual language of the cases, but from the general misunderstanding of what is meant.[134] It does not take a sage to detect our supreme court's ambivalence toward the application of the

---

(1969); People v. Di Tomaso, 248 Cal. App. 2d 741, 57 Cal. Rptr. 293 (Dist. Ct. App. 1967); Commonwealth v. Rosenblatt, 416 S.W.2d 754 (Ky. 1967).

[132] *See* Mississippi State Highway Comm'n v. Daniels, 235 Miss. 185, 108 So. 2d 854 (1959), where the court stated:

> Of course, it [the testimony of the landowner's appraisal witness] shows the witness considered an improper element in estimating the amount of damages, and the court should have sustained the motion to exclude the testimony of this witness.

Id. at 199, 108 So. 2d at 860.

[133] 291 So. 2d 712 (Miss. 1974). In that case the court stated:

> The only part of [the appraisal witness's] testimony [for the landowner] that could be subject to objection was that part relative to the method he used to make his appraisal of the property for industrial purposes. However, since appellant did not restrict its motion to excluding only this part of his testimony, we do not pause to consider this question for the reason we cannot put the trial court in error in overruling the motion as made.

Id. at 714.

While the court has not overruled Mississippi State Highway Comm'n v. Daniels, 235 Miss. 185, 108 So. 2d 854 (1959), the indications are that the court is apparently adopting the majority rule and will exclude only impermissible elements of damage if they are capable of complete separation. Should they lack this capability, the court will probably exclude the entire testimony of the witness.

[134] Mississippi State Highway Comm'n v. Central Land & Rental Corp., 239 So. 2d 335 (Miss. 1970) (rejection of the indemnity approach to value in favor of fair market value standard, yet allowing an element of damage that could only be considered through application of the indemnity approach).

fair market value standard. In fact the court seems to be expressing a general lack of interest in condemnation litigation[135] as is evidenced by the fact that not a single reversible error has been found in any appeal taken by a condemnor in the last 4 years.[136]

At a time when the demand of citizens for more public and quasi-public services is high and more condemnation is imminent, the bar needs guidance from the court. The court has not addressed many of the questions that arise during the trial of such cases. Even more of a problem, however, is the inability of the court to state with certainty which standard of measurement will be applied to determine just compensation. This uncertainty partially accounts for the great variation in values arrived at by the opinion witnesses. In effect, one side speaks of the proverbial oranges while the other speaks of apples. We have come to the point when we should say to ourselves, as a great country lawyer said many years ago, "If we could first know where we are, and whither we are tending, we could better judge what to do, and how to do it."[137]

---

[135] Mississippi State Highway Comm'n v. Null, 210 So. 2d 661 (Miss. 1968) (since the issue of liability was already predetermined, the errors complained of, while serious in other types of litigation were of no special consequence).

[136] Mississippi State Highway Comm'n v. Central Land & Rental Corp., 239 So. 2d 335 (Miss. 1970) (reversed and remanded September 28, 1970). The court often finds errors in such appeals. They are, however, classified as "harmless errors" under the court's rule 11. *Compare* Mississippi State Highway Comm'n v. Crooks, 282 So. 2d 232 (Miss. 1973) ("harmless error" to instruct the jury that the condemnor had the burden of proving the issue of damages when, in fact, it did not have such a burden), *with* Sarphie v. Mississippi State Highway Comm'n, 275 So. 2d 381 (Miss. 1973) (appeal perfected by a landowner reversed and remanded because the jury, in returning the exact figure testified to by the condemnor's witness, "did not respond to reason").

[137] 2 C. SANDBURG, ABRAHAM LINCOLN THE PRAIRIE YEARS 102 (1926).

ESTATE PLANNING AND MISSISSIPPI'S ESTATE TAX

*Edward E. Milam**

In recent years the term "estate planning" has become increasingly popular and has been defined several ways. "Estate planning" is often used to describe the plans which a person makes to provide for the welfare and security of his family after his death. In a broader sense, however, estate planning is an approach to the accumulation, conservation, and distribution of property. Estate planning may also be defined as the process of planning for human needs. According to this definition an estate plan should achieve a balance between one's personal goals and economic potential.

Legally, an estate is created upon death. The estate is composed of the sum of the values of all the decedent's property to the extent of his interest in such property at the time of his death. As a separate entity, the estate is faced with the burdens of federal and state taxation. Too often the estate planner devotes his entire attention to the minimization of federal estate tax and gives little or no attention to state estate taxes. On the surface, this neglect seems understandable: the estate tax of most states is negligible when compared to the federal tax, and, furthermore, state estate taxes are credited against the federal tax.[1] Nevertheless, no estate plan is complete without consideration of the state taxes.

I. Mississippi's Estate Tax

Mississippi's first estate tax laws were enacted in 1918.[2] Amendments in 1922 introduced severe penalties for failure to pay the tax or file the return and gave the State Tax Commission power to bring contempt proceedings against persons failing to file the return or pay the tax.[3] The estate tax laws were reenacted in 1924[4] and have since remained relatively unchanged. In 1956 the laws were amended to increase the specific exemption from $50,000 to $60,000[5] and the tax rate on the

---

*Assistant Professor of Accountancy, University of Mississippi. B.S. 1965, Delta State University; M.S. 1967, Ph.D. 1971, Louisiana State University.

[1] Int. Rev. Code of 1954, § 2011.

[2] Act of March 28, 1918, ch. 109, [1918] Gen. Laws Miss. 94.

[3] Act of April 7, 1922, ch. 131, § 1, [1922] Gen. Laws Miss. 116.

[4] Act of March 28, 1924, ch. 134, [1924] Gen. Laws Miss. 161.

[5] Act of March 22, 1956, ch. 413, § 6, [1956] Gen. Laws Miss. 645 (codified at Miss. Code Ann. § 27-9-11 (1972)).

first $60,000 of the taxable estate from four-fifths of 1 percent to 1 percent.[6] These amendments also made several procedural changes (including the date for filing the return and paying the tax) aimed at bringing the state statutes more in line with the federal scheme.[7] Chapter 559 of the 1958 Laws amended section 9262-09[8] of the Mississippi Code of 1942 to provide that a nonresident decedent's property located within Mississippi is not subject to the estate tax unless the entire gross estate exceeds $60,000; chapter 558 of the 1958 Laws amended section 9262-05[9] to permit charitable deductions only for gifts to charities located within the United States or its possessions. Amendments enacted in 1960 granted an exemption for intangible property, located in Mississippi, belonging to nonresident decedents residing in states which exempt intangible personalty of Mississippians.[10] In addition, section 9262-04 was amended to provide that where the alternative valuation date is used for federal estate tax purposes, it must also be used as the Mississippi valuation date.[11] To bring the state laws into closer agreement with the federal laws, the legislature passed additional amendments in 1966 and 1972. The 1966 amendments increased from 2 to 3 years the period during which gifts are presumed to have been made in contemplation of death.[12] The 1972 amendments shortened the period for the alternative valuation date from 1 year to 6 months after the date of decedent's death[13] and changed from 15 months to 9 months the period for filing the return[14] and paying the tax.[15]

---

[6] Act of March 22, 1956, ch. 413, § 3, [1956] Gen. Laws Miss. 642 (codified at MISS. CODE ANN. § 27-9-5 (1972)).

[7] Act of March 22, 1956, ch. 413, §§ 13, 15, [1956] Gen. Laws Miss. 647, 648 (codified at MISS. CODE ANN. §§ 27-9-23, -27 (1972), *as amended,* (Supp. 1973)).

[8] The present MISS. CODE ANN. § 27-9-17 (1972).

[9] The present MISS. CODE ANN. § 27-9-9 (1972).

[10] Act of April 30, 1960, ch. 462, § 1, [1960] Gen. Laws Miss. 771 (codified at MISS. CODE ANN. § 27-9-13 (1972)). The doctrine of equitable conversion, under which partnership property, both real and personal, is deemed, for some purposes, to be converted into intangible personalty, has been held inapplicable for purposes of this statute. Thus such property (unless intangible in itself) is not eligible for the reciprocal exemption. Tinsley v. State Tax Comm'n, 235 So. 2d 698 (Miss. 1970).

[11] Act of April 30, 1960, ch. 460, § 1, [1960] Gen. Laws Miss. 769 (codified at MISS. CODE ANN. § 27-9-7 (1972), *as amended,* (Supp. 1973)).

[12] Act of May 17, 1966, ch. 634, § 1, [1966] Gen. Laws Miss. 1305 (codified at MISS. CODE ANN. § 27-9-7 (1972), *as amended,* (Supp. 1973)).

[13] Act of May 5, 1972, ch. 457, § 1, [1972] Gen. Laws Miss. 578 (codified at MISS. CODE ANN. § 27-9-7 (Supp. 1973)).

[14] Act of May 5, 1972, ch. 457, § 2, [1972] Gen. Laws Miss. 580 (codified at MISS. CODE ANN. § 27-9-23 (Supp. 1973)).

[15] Act of May 5, 1972, ch. 457, § 3, [1972] Gen. Laws Miss. 580 (codified at MISS. CODE ANN. § 27-9-27 (Supp. 1973)).

A. The Gross Estate

The estate tax laws of Mississippi explicitly distinguish between residents and nonresidents. A resident, as defined by section 27-9-3(f) of the Mississippi Code of 1972, includes any person domiciled in the state "and any other person who maintains a permanent place of abode within the state and spends in the aggregate more than six months of the taxable year within the state." Section 27-9-3(g) defines a nonresident as a person who is domiciled outside the state, maintains a place of abode without the state, and "spends in the aggregate more than six months without the state."

The law requires that the value, to the extent of the decedent's interest at the time of his death, of all property (real and personal, tangible and intangible) located within Mississippi be included in a resident's estate. Also included is all intangible personal property belonging to a resident decedent, regardless of where such property is situated. Real estate and tangible personal property located outside the state are excluded from the resident decedent's gross estate. Thus, the following items are included in the gross estate of all resident decedents: (1) All real property located within the state; (2) tangible personal property, such as automobiles and jewelry, situated within the state; (3) deposits in banks and savings institutions; (4) stocks, bonds, notes, accounts receivable, leasehold interests, patents, and all other intangible personal property; (5) all life insurance payable to the executor of the estate and all benefits in excess of $20,000 payable to all other beneficiaries on policies to which the decedent possessed any incident of ownership at the time of his death; (6) all property transferred without adequate consideration within 3 years prior to death (such transfers are considered to be transfers in contemplation of death unless the executor or beneficiaries can prove otherwise); (7) all property passing under a general power of appointment exercised by the decedent's will or deed to take effect at or after his death (except in the case of a bona fide sale); and (8) property held jointly or as a tenant in the entirety (the entire value of such property is included in the decedent's gross estate except to the extent that any portion can be shown to have belonged originally to the surviving cotenant or never to have belonged to decedent).[16]

Mississippi's estate tax law allows the exclusion of all intangible personal property, wherever located, from the gross estate of nonresident decedents but requires the inclusion of all real estate and tangible personal property located within the state.[17]

---

[16] MISS. CODE ANN. § 27-9-7 (Supp. 1973).

[17] *Id.*

B. Valuations

All property included in the gross estate is valued at its fair market value as of the date of the decedent's death.[18] Although there is no official definition of fair market value, the commissioner[19] accepts the same valuations used on the federal return.[20] The valuation of real property is often troublesome and is frequently reviewed by the commissioner. If town or city property valued at $5,000 or more is included in the gross estate, the executor should obtain appraisals from at least two real estate agents to support his valuation. If rural real estate is included, opinions of at least two landholders familiar with the property in question should be secured.[21]

Stocks and bonds traded on an exchange should be valued at their market quotations. In order to arrive at a stable figure representing true fair market value, the average price over a fair and representative period of time must be used. If the stocks and bonds are not traded on an exchange, the commissioner, by comparison and inquiry, determines their value, and the executor has the burden of proving any different value. If it can be established that the value of such stocks and bonds determined on the basis of selling prices or bid-and-ask prices does not reflect the fair market value, then other relevant elements must be considered. Among these elements are the book value of the stock, the company's earnings and financial position, goodwill, and any stock purchase agreement.[22]

Since the commissioner deems all valuations accepted by the federal government to be prima facie correct, the executor may use those valuations on the Mississippi estate tax return, but the executor must furnish the commissioner with a copy of the valuations changed or accepted by the Internal Revenue Service.[23]

If the executor elects to use the alternative valuation date for the federal return, he must also use it on the state return. The alternative valuation date is the date 6 months after the date of the decedent's death and calls for the following valuations: (1) If property is distributed, sold, exchanged, or otherwise disposed within 6 months after the decedent's death, it must be valued as of the date of its distribution,

---

[18] *See* MISSISSIPPI STATE TAX COMM'N, INHERITANCE (OR ESTATE) TAX LAW, FILING INSTRUCTIONS 4-5 (1972).

[19] As used herein, the term "commissioner" means "the chairman of the state tax commission or any agent appointed by law under him." MISS. CODE ANN. § 27-9-3(a) (1972).

[20] *Id.* § 27-9-29.

[21] CCH INH. EST. & GIFT TAX REP. 35,214 (1973).

[22] *Id.* at 35,216.

[23] MISS. CODE ANN. § 27-9-29 (1972).

sale, exchange, or other disposition; (2) if property is not distributed, sold, exchanged, or otherwise disposed within 6 months of the decedent's death, it must be valued as of the date 6 months after the decedent's death; (3) if property whose value is affected by a mere lapse of time is included in the gross estate, that property should be valued as of the date of the decedent's death instead of the later date.[24]

C. Deductions from the Gross Estate

In order to determine the net estate, several deductions are allowed from the resident decedent's gross estate. These deductions include funeral and administration expenses; unpaid mortgages and other claims against the estate; and losses (not covered by insurance) from fire, storm, theft, or other casualties incurred during the settlement of the estate. The estate is also allowed a deduction for reasonable amounts required and spent as allowed by the laws of Mississippi for the support of the decedent's dependents during the settlement of the estate. A further deduction is allowed for previously taxed property, which is defined as property on which a Mississippi estate tax has been paid within 2 years prior to the decedent's death or property acquired in exchange for such property.[25]

The amount of any bequest, legacy, or gift to the State of Mississippi or any of its political subdivisions (if the proceeds are to be used exclusively for public purposes) is deductible from the gross estate. The estate is also allowed a deduction for charitable donations. To qualify as a charitable donation, the gift, bequest, or legacy must be made to a corporation or association that meets all of the following tests: (1) It must be organized and operated exclusively for religious, scientific, literary, charitable, or educational purposes; (2) it must be located within the United States or its possessions; and (3) it must be structured so that no part of its earnings accrue to the benefit of any stockholder or individual.[26] Taxes accrued and payable as of the date of the decedent's death are also deductible, but there is no deduction for income taxes paid upon income received after the decedent's death. Nor is there a deduction for either state or federal estate taxes.[27] In addition to the aforementioned deductions, the resident decedent is entitled to a specific exemption of $60,000.[28]

---

[24] *Id.* § 27-9-7 (Supp. 1973).

[25] *Id.* § 27-9-9 (1972).

[26] *Id.* If the decedent was a resident, there is no requirement that the charitable association or corporation be located or make any contributions in Mississippi. First Nat'l Bank v. State Tax Comm'n, 210 Miss. 590, 49 So. 2d 410 (1950), *suggestion of error overruled,* 210 Miss. 601, 50 So. 2d 146 (1951).

[27] Miss. Code Ann. § 27-9-9 (1972).

[28] *Id.* § 27-9-11.

With the exception of charitable contributions, the allowable deductions from the gross estate of a nonresident decedent are the same as those allowed from a resident decedent's estate. However, the amount of each deduction is limited to the proportion of the deduction that the value of the gross estate located in Mississippi bears to the value of the entire gross estate. With previously taxed property, the deduction is limited to the value of the property included in the decedent's gross estate located in Mississippi and is allowed only if a Mississippi estate tax was paid on the prior transfer. The nonresident decedent's estate is entitled to a deduction for charitable contributions only if the contributions are to be used within the state or are contributed to charitable institutions operating at least partly in the state.[29]

Rather than pay an estate tax on the proportion of the estate located within the state reduced by the allowable deductions and exemptions in the same proportions, the representative of a nonresident decedent's estate may elect to pay an estate tax based on the gross estate situated within the State of Mississippi without taking any deductions.[30] By so electing, executors of estates composed of property located in several states may conveniently dispose of the tax liability in at least one state. In any case, the estate is not subject to any Mississippi estate tax liability unless the gross estate is at least $60,000.[31]

D. Calculating the Tax

Since the Mississippi tax is an estate tax rather than an inheritance tax, the amount of the tax is determined by applying the appropriate rates to the taxable estate without regard to the beneficiaries or their relationship to the decedent. The taxable estate is determined by subtracting the specific exemption and other allowable deductions from the gross estate.[32] This taxable estate is separated into brackets with the rate for each successive bracket being progressively higher. In determining the tax, the rate in each bracket is multiplied by the amount in that bracket, and the successive products are summed to obtain the total tax.[33]

E. Filing the Return and Paying the Tax

Under Mississippi law, an estate tax return must be filed for the

---

[29] *Id.* § 27-9-15.

[30] *Id.* § 27-9-17.

[31] *Id.*

[32] *Id.* §§ 27-9-9, -11, -15.

[33] The following is a table of the rates prevailing under MISS. CODE ANN. § 27-9-5 (1972):

estate of every resident whose gross estate exceeds $60,000 on the date of death. For nonresident decedents, a Mississippi estate tax return must be filed when any part of his gross estate is situated within the state and the value of the entire gross estate, wherever situated, exceeds $60,000. The return must be filed and the tax paid within 9 months after the decedent's death.[34] In addition to filing the regular return, the representative must file an advance return within 60 days after the decedent's death or within a like period after the qualification of the executor or the appointment of an administrator. The advance return should indi-

RATES ON NET ESTATE

Exceeding	Not Exceeding	Rate of Tax
$ -0-	$ 60,000	1 %
60,000	100,000	1 3/5%
100,000	200,000	2 2/5%
200,000	400,000	3 1/5%
400,000	600,000	4 %
600,000	800,000	4 4/5%
800,000	1,000,000	5 3/5%
1,000,000	1,500,000	6 2/5%
1,500,000	2,000,000	7 1/5%
2,000,000	2,500,000	8 %
2,500,000	3,000,000	8 4/5%
3,000,000	3,500,000	9 3/5%
3,500,000	4,000,000	10 2/5%
4,000,000	5,000,000	11 1/5%
5,000,000	6,000,000	12 %
6,000,000	7,000,000	12 4/5%
7,000,000	8,000,000	13 3/5%
8,000,000	9,000,000	14 2/5%
9,000,000	10,000,000	15 1/5%
10,000,000	——	16 %

Example: John Doe's gross estate is valued at $600,000, and the allowable deductions total $140,000. His Mississippi estate tax is calculated as follows:

Gross estate		$600,000
Less: Allowable deductions	$140,000	
Specific exemption	60,000	
		200,000
Taxable estate		$400,000

Tax on $400,000 is determined as follows:

$ 60,000 @	1 % =	$ 600
40,000 @	1 3/5% =	640
100,000 @	2 2/5% =	2,400
200,000 @	3 1/5% =	6,400
Total Mississippi estate tax:		$10,040

[34] *Id.* § 27-9-23 (Supp. 1973).

cate the name of the decedent, date of death, name of attorney, probable value of the gross estate, and any transfers the decedent made in the 3 years preceding his death.[35]

Payment of the tax within 9 months after the date of the decedent's death often creates a hardship for many estates. Frequently a substantial estate will have little or no cash or liquid assets. To alleviate an undue hardship on the estate, the commissioner may grant extensions for the payment of tax for periods not to exceed 6 months per extension. For any tax not paid within 9 months after the date of decedent's death (including those instances where extensions have been granted) interest is charged on the amount of unpaid tax at the rate of one-half of 1 percent per month.[36] Thus, the estate planner should take steps to ensure that the estate will have sufficient liquid assets to meet these obligations.

The state has a lien upon the assets of the gross estate for 4 years after the return is filed. If no estate tax return is filed, the lien runs for 10 years from the due date of the return. When the commissioner determines that the tax liability has been satisfied or adequately provided for, he issues a certificate releasing all or part of the property from the lien.[37]

Not only is the executor or administrator responsible for filing the return, but he also is personally liable for payment of the tax if he pays any of the estate debts (except those which are specifically allowed by statute) before he pays the tax.[38] Furthermore, if the executor willfully refuses to pay the tax, file a required return, supply any information, or exhibit any books or records when requested to do so by the commissioner, he is subject to a fine of not less than $500 nor more than $1,000 and/or imprisonment for not more than 1 year.[39]

Upon receipt of payment for the tax due, the commissioner gives the executor a temporary receipt. All returns are subject to investigation and audit before the commissioner issues a final receipt, and the commissioner is granted a period of 4 years after the filing of the return to complete his investigations. However, if the executor furnishes the commissioner with the valuations accepted by the federal government and a statement from the federal government that all federal estate taxes have been paid and if all estate taxes based upon the same valuations have been paid to the state, the commissioner may grant the executor

---

[35] *Id.* § 27-9-21 (1972).
[36] *Id.* § 27-9-27 (Supp. 1973).
[37] *Id.* § 27-9-35 (1972).
[38] *Id.* § 27-9-37.
[39] *Id.* § 27-9-57.

a final receipt.[40] The executor should not overlook the importance of obtaining this final receipt.

II. Mississippi's Estate Tax Compared with Federal Estate Tax

Estate planners should understand that there are several important differences between Mississippi's estate tax and the federal estate tax. One significant difference is the federal marital deduction.[41] Since the Mississippi laws do not allow such a deduction, it is quite possible that an estate might be subject to the Mississippi estate tax but not to the federal tax. Another difference is that Mississippi does not have a gift tax. This circumstance can generate significant savings and should always be considered during the estate planning process. A third difference centers around the provisions concerning life insurance. While the entire proceeds from all life insurance policies owned by the decedent are included in his gross estate for federal tax purposes,[42] the Mississippi tax laws permit the exclusion of life insurance payments up to $20,000 if they are payable to a named beneficiary other than the executor or the decedent's estate.[43] Thus, all else being equal, a Mississippian whose estate includes life insurance will incur less estate tax than a fellow Mississippian without life insurance. Another consideration is the deduction on the state return for a court-ordered widow's or dependent's allowance.[44] Where such an allowance can be obtained, the estate plan should take advantage of this deduction.

III. Conclusion

Estate planning is a process which, if well performed, can make an important contribution to the realization of the goals of a person and his family. Because people's objectives, attitudes, and assets differ, an estate plan should be designed to meet specific needs. Each plan must reflect the responsibilities and objectives of the person for whom it is drawn. But the estate planning process should always include an analysis of state, as well as federal, taxes.

---

[40] *Id.* § 27-9-29.

[41] Int. Rev. Code of 1954, § 2056.

[42] *Id.* § 2042.

[43] Miss. Code Ann. § 27-9-7(e) (Supp. 1973).

[44] *Id.* § 27-9-9(1) (1972).

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR and
the UNIVERSITY of MISSISSIPPI SCHOOL of LAW

VOLUME 46 WINTER 1975 NUMBER 1

EDITORIAL BOARD

Editor-in-Chief
STEPHEN W. ROSENBLATT

Assistant Editor
B. WAYNE VANCE

Article Editors
DAVID BISHOP HOWORTH
LERAY MCNAMARA

Comment Editors
MARTIN C. MCWILLIAMS, JR.
THOMAS CLEVELAND COLLIER, JR.

Research Editors
WILLIAM JOSEPH LANDERS
JOHN HENEGAN
JAMES MONTGOMERY HALL

Note Editors
JUDITH JONES JOHNSON
JOHN DAVID DUFFUS

Index and Review Editor
JIM BARNETTE TOHILL

Business Manager
E. STEPHEN WILLIAMS

Associate Editors
DAVID TOWNES LAIL
HENRY A. SCHUTZ III
CHARLES F. JOHNSON III

Faculty Advisor
THOMAS R. ETHRIDGE

JACKSON HENDERSON ABLES III
BILLUPS S. ALLEN
WILLIAM RIDDICK ARMSTRONG, JR.
WILLIAM MICHAEL BEASLEY
SI MORGAN BONDURANT
KIM TURNER CHAZE
JOE PRICE COLEMAN
THOMAS ARCHIE COOK
JOHN HENRY CROUCH
PAUL J. DELCAMBRE, JR.
JAMES O. DUKES
HIRAM C. EASTLAND, JR.
THOMAS CARTER GERITY
WILLIAM N. GRAHAM
RUSSELL P. GRANT, JR.
KAREN OAKES GREEN
BENJAMIN E. GRIFFITH
WILLIAM E. HESTER III
WILTON JEROME JOHNSON III
CRANE DAVIS KIPP
WILLIAM NORMAN KRUCKS
PAUL R. LAMBERT
ROBERT M. LOGAN, JR.
GERALD RICHARD MCLEMORE
COLMON S. MITCHELL
WILLIAM CLARTIS MURPHREE
W. MCDONALD NICHOLS
ROBERT H. PEDERSEN
BENJAMIN JOSEPH PIAZZA, JR.
CHARLES M. POWERS
RICHARD CHARLTON ROBERTS III
EUGENE CLARK RUMFELT
HUBBARD TURNER SAUNDERS IV
ERIC CAMPBELL SCHWEITZER
DOUGLAS JOHNSTON SMITH, JR.
CHARLES EDWARD SOREY II
GLENN GATES TAYLOR
DANIEL E. TYLER
ROGER F. WICKER
J. STEPHEN WRIGHT

COMMENTS

FEDERAL AND STATE CLASS ACTIONS: DEVELOPMENTS AND OPPORTUNITIES

Class actions are surrounded by controversy. Some feel that "[t]he class action is one of the few legal remedies the small claimant has against those who command the status quo."[1] Others believe that large class actions are "legalized blackmail" in that the threat of financial ruin forces defendants to settle.[2] Critics point to "monster" suits[3] as prima facie abuses of the remedy despite statistics showing that such suits are the exception rather than the rule.[4] As the commentators argue about the merits of class actions, the number of class suits filed steadily increases.[5] Recent decisions by the United States Supreme Court have severely limited the use of large class suits.[6] Although these limitations may have been in response to alleged abuses, the courts have utilized tests which restate ancient common law requirements to determine the maintainability of the actions.[7] In light of the recent Supreme Court decisions and the limited availability of this procedural device in Mis-

---

[1] Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140, 2156 (1974) (Douglas, J., concurring, dissenting in part).

[2] *E.g.*, Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 COLUM. L. REV. 1, 8-9 (1971).

[3] *E.g.*, Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972) (dismissing appeal from denial of class representing all consumers of pan-baked bread in Philadelphia); Huddard v. Crosby Corp., Civil No. 2454-72 (D.D.C., Dec. 14, 1973) (all persons who had purchased stocks from any mutual fund), *cited in* Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123, 1134 n.66 (1974); Bartholomew v. Volkswagen of America, Inc., Civil No. 2172-71 (D.D.C., Oct. 28, 1971) (all owners of 1965-1970 model Volkswagens), *cited in* Note, *supra*, at 1134 n.67.

A group of plaintiffs recently attempted to bring an antitrust action for damages, alleging a nationwide conspiracy among hotel chains to increase room rates by charging for telephone calls. *In re* Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974). The court estimated the class at 40 million people with damages of $2.00 each. *Id.* at 88. In denying class status, the court noted that:

> Assuming only ten percent of these unknown class members came forward with claims, and assuming the proof of each claim required only ten minutes, approximately one hundred years would yet be required to adjudicate the claims.

Id. at 89. This case, said the court, presented "mind-boggling manageability problems." *Id.* at 92.

[4] Less than half of the class suits filed have sought damages and only 24 percent of the suits were consumer actions. Note, *supra* note 3, at 1131-33.

[5] *See id.* at 1129.

[6] Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140 (1974); Zahn v. International Paper Co., 414 U.S. 291 (1973).

[7] *See* FED. R. CIV. P. 23 and the state provisions discussed in part IV *infra*.

sissippi,[8] the logic and reasoning used by early common law courts in developing the class action is relevant.

I. Development of the Class Action

The general common law rule was that all persons interested in the subject matter must be brought before the court, so that "complete justice may be done."[9] The courts, however, began to recognize exceptions to this rule where it would be unjust to require the joinder of all parties.[10] In 1676 an English court held that all parishioners were bound by a decree concerning tithes owed the vicar, although only four parishioners had brought the earlier suit.[11] The court reasoned that to hold otherwise would result in an "infinite" number of suits.[12] These early cases were known as bills of peace with multiple parties. This action would lie when several persons had causes of action involving common questions of law or fact against a single defendant.[13] Since they were not joint obligors they could not be joined.[14] In order, therefore, to prevent litigation of the same issue by each person and because it was obviously more expedient to settle all the common questions in one suit,[15] a bill of peace was granted. For example, in the early case of *How v. Tenants of Bromsgrove*,[16] a bill of peace was allowed "to prevent multiplicity of suits"[17] when a controversy arose between the manorial lord and his tenants concerning the lord's right to appropriate part of the village commons for his own use.

"From such a bill of peace it was a natural step to a representative suit. The very identity of interests which made it easy to bring every-

---

[8] *See* the discussion on the limited availability of class actions in Mississippi in part III *infra*.

[9] West v. Randall, 29 F. Cas. 718 (No. 17,424) (C.C.R.I. 1820); Cockburn v. Thompson, 33 Eng. Rep. 1005, 1007 (Ch. 1809); Knight v. Knight, 24 Eng. Rep. 1088, 1089 (Ch. 1734); 3B J. Moore, Federal Practice ¶ 23.02(1), at 23-72 (2d ed. 1974); Moore & Cohn, *Federal Class Actions*, 32 Ill. L. Rev. 307 (1937).

[10] *See, e.g.*, Cockburn v. Thompson, 33 Eng. Rep. 1005, 1008 (Ch. 1809).

[11] Brown v. Vermuden, 22 Eng. Rep. 796 (Ch. 1676).

[12] *Id.* at 797.

[13] Z. Chafee, *Bills of Peace with Multiple Parties*, 45 Harv. L. Rev. 1297 (1932), in Some Problems of Equity 149, 149-50 (1950). For further discussion of bills of peace, see 1 J. Pomeroy, A Treatise on Equity Jurisprudence §§ 243-75 (5th ed. S. Symons 1941) [hereinafter cited as Pomeroy].

[14] Z. Chafee, *supra* note 13.

[15] Z. Chafee, Some Problems of Equity 201 (1950); *see* Mayor of York v. Pilkington, 25 Eng. Rep. 946 (Ch. 1737), where a bill of peace was allowed when the plaintiff sued five parties for the possession of a fishery. The court allowed the action, although there was no privity between the parties and each defendant might assert separate defenses, since the "general right" was at issue.

[16] 23 Eng. Rep. 277 (Ch. 1681).

[17] *Id.*

body in, also made it somewhat superfluous to do so."[18] As class actions developed, the English courts began to recognize the propriety of the action in certain situations.[19] The impossibility of joining all parties because some were outside the jurisdiction of the court was accepted as an appropriate justification for representative suits.[20] Class actions were also allowed where joinder would prevent an adjudication of the rights involved because of "continual abatements."[21] Although all of the members of the class could have been brought into court, many cases allowed representative suits if the "numerousness" of the parties would make joinder "impracticable."[22] Regardless of the category of the case, the courts looked for certain factors considered essential to fair representation of the absent parties. It was required, therefore, that the multitude have a common[23] or joint[24] interest in the subject matter of the suit or at least that the relief sought be beneficial to all.[25] Sufficient parties had to be before the court to ensure that any divergent interests were adequately represented.[26] Other equitable motivations were the basis for the most important criterion for the maintenance of a class suit — the failure of justice which might otherwise occur.[27] Also, since the judgment may be binding on the absent parties,[28] notice was sometimes required to give them a chance to participate in the ensuing rewards.[29]

Justice Story first recognized the propriety of this type of action in

---

[18] Z. CHAFEE, *supra* note 15, at 201.

[19] *Id.* at 209-12; 3B J. MOORE, *supra* note 9, at 23-73; J. STORY, COMMENTARIES ON EQUITY PLEADINGS § 97 (5th ed. 1852).

[20] *E.g.*, Quintine v. Yard, 21 Eng. Rep. 886 (Ch. 1702) (defendants in England allowed to represent those in Barbados); *see* Good v. Blewitt, 33 Eng. Rep. 343 (Ch. 1807) (suit by captain of privateer for distribution of the ship's prize).

[21] *E.g.*, Meux v. Maltby, 36 Eng. Rep. 621 (Ch. 1818) (suit by seven shareholders in joint stock company); Chancey v. May, 24 Eng. Rep. 265 (Ch. 1722) (18 shareholders in copartnership allowed to sue on behalf of all 800).

[22] *E.g.*, Taylor v. Salmon, 41 Eng. Rep. 53 (Ch. 1838); Adair v. New River Co., 32 Eng. Rep. 1153 (Ch. 1805); City of London v. Richmond, 23 Eng. Rep. 870 (Ch. 1701).

[23] Taylor v. Salmon, 41 Eng. Rep. 53, 56 (Ch. 1838); Attorney Gen. v. Heelis, 57 Eng. Rep. 270, 274 (Ch. 1824); Good v. Blewitt, 33 Eng. Rep. 343, 345 (Ch. 1807); Adair v. New River Co., 32 Eng. Rep. 1153, 1159 (Ch. 1805).

[24] *E.g.*, Lloyd v. Loaring, 31 Eng. Rep. 1302, 1305 (Ch. 1802).

[25] Gray v. Chaplin, 57 Eng. Rep. 348, 350 (Ch. 1825).

[26] Meux v. Maltby, 36 Eng. Rep. 621, 624 (Ch. 1818); Adair v. New River Co., 32 Eng. Rep. 1153, 1159 (Ch. 1805).

[27] Taylor v. Salmon, 41 Eng. Rep. 53, 56 (Ch. 1838) ("no other remedy"); Meux v. Maltby, 36 Eng. Rep. 621, 623 (Ch. 1818) ("a failure of justice would ensue" unless the action is allowed); Cockburn v. Thompson, 33 Eng. Rep. 1005, 1008 (Ch. 1809) ("necessary to justice"); Chancey v. May, 24 Eng. Rep. 265 (Ch. 1722) ("No coming at justice, if all were made parties").

[28] *See* cases cited note 27 *supra*.

[29] *See* Good v. Blewitt, 34 Eng. Rep. 542 (Ch. 1815), where Lord Eldon required that advertisements be placed informing the absent parties of the decree.

the United States in 1820 when, after enumerating the English cases, he observed:

> The principle, upon which all classes of cases stand, is, that the court must either wholly deny the plaintiffs an equitable relief, to which they are entitled, or grant it without making other persons parties; and the latter it deems the least evil . . . .[30]

The first federal equity rules allowed class actions if the parties were so numerous that joinder would result in inconvenience and delay.[31] In addition, the court required sufficient parties in order to ensure adequate representation.[32] Absent members, however, were not bound by the decree;[33] this negated one of the principal advantages of class suits, the prevention of multiple actions.[34] This section of the rule was justifiably ignored in 1853 by the Supreme Court in *Smith v. Swormstedt*.[35] Justice Story's interpretation of the English rule was adopted.[36] Four plaintiffs were allowed to represent some 1500 preachers of the Methodist Episcopal Church South in a suit against the Methodist Episcopal Church North. Although this suit concerned property in which all the parties had a joint and common interest, the Court recognized that representative suits could be allowed where there is some "common interest" even though the rights of the parties are "separate and distinct."[37] The Court acknowledged that requiring the presence of all the parties would result in a "denial of justice."[38]

The adoption of Equity Rule 38[39] strengthened the representative action. While this rule was similar to its predecessor, the omission of a limitation on the binding effect of class suits constituted a major change.[40] Any doubts about the effect of that change were resolved in *Supreme Tribe of Ben-Hur v. Cauble*,[41] where the Supreme Court held that a prior class suit precluded subsequent litigation by other class

---

[30] West v. Randall, 29 F. Cas. 718 (No. 17,424) (C.C.R.I. 1820).

[31] Equity R. 48, 42 U.S. (1 How.) lvi (1842).

[32] *Id.*

[33] *Id.*

[34] *See* text accompanying note 11 *supra*.

[35] 57 U.S. (16 How.) 288, 303 (1853) ("[T]he decree binds all of them the same as if all were before the court."). *But see* Wabash R.R. v. Adelbert College, 208 U.S. 38, 57-59 (1908).

[36] The Court relied on Justice Story's treatise, *Commentaries on Equity Pleadings*. Section 97 of the fifth edition of this work enumerates the categories discerned by Story. See Smith v. Swormstedt, 57 U.S. (16 How.) 288, 302-03 (1853).

[37] 57 U.S. (16 How.) at 302; *see* Bacon v. Robertson, 59 U.S. (18 How.) 480, 489 (1855).

[38] 57 U.S. (16 How.) at 303.

[39] Equity R. 38, 226 U.S. 659 (1912).

[40] *See* J. HOPKINS, THE NEW FEDERAL EQUITY RULES 231 (7th ed. 1930).

[41] 255 U.S. 356 (1921).

members.[42] The Court recognized that the change in rule 38 could not expand federal jurisdiction, but decided that the prior existence of class suits and the need for an effective, consistent judgment for all members of the class mandated that the judgment be binding on "all of the class properly presented."[43]

Rule 23 of the Federal Rules of Civil Procedure,[44] adopted in 1938, was intended to be a restatement of former rule 38 as it had been interpreted.[45] The new rule delineated three categories of acceptable class actions.[46] Largely because of Moore's treatise on federal procedure,[47] these categories came to be known as "true," "hybrid," and "spurious"; the binding effect of each suit was entirely dependent upon the category in which it became lodged.[48]

The ability of the class to aggregate its claims to meet the jurisdic-

---

[42] The Court also held that intervention by nondiverse class members would not have destroyed diversity jurisdiction. *Id.* at 366.

[43] *Id.* at 366-67. Compare this with the Court's reasoning in Zahn v. International Paper Co., 414 U.S. 291 (1973), discussed at text accompanying notes 68 through 78 *infra*. While acknowledging the necessity of a binding judgment on all those properly presented, one commentator noted the need for apprising absent class members of the pending litigation, since their financial interests might be seriously affected. Z. CHAFEE, *supra* note 15, at 231.

[44] (a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary . . .

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

. . . .

(c) . . . If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

Fed. R. Civ. P. 23, 308 U.S. 689 (1939).

[45] ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, NOTES TO THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES R. 23, at 22 (1938).

[46] Note 44 *supra*. Chafee noted that the rule employed the

outworn categories of rights—"joint," "several," "common" . . . [which are] more suitable in a law review article than in an enactment which is to guide the actions of practical men day in and day out.

Z. CHAFEE, *supra* note 15, at 245-46; *see* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1752 (1972) [hereinafter cited as WRIGHT & MILLER].

[47] 2 J. MOORE, *supra* note 9, ¶ 23.04 (1938).

[48] See *id.* Chafee, in commenting on these labels and their attendant consequences, remarked that after the revision committee had rejected Moore's proposal, Mr. Moore was "[n]owise discouraged at being thus locked out at the front door, [but] soon contrived to slip in by the back door." Z. CHAFEE, *supra* note 15, at 251.

tional amount also depended on the suit's label. An action was considered a "true" class suit if the parties were asserting a common and undivided interest. In these actions, the total value of the plaintiffs' claim was the amount in controversy.[49] In "hybrid" and "spurious" class actions parties could not aggregate their claims;[50] courts required that each individual party aver and prove damages in excess of the jurisdictional amount.[51] Regardless of the existence of any community of interest,[52] unless the court labeled the action a "true" class suit, aggregation was not allowed.[53] Although the class action "came of age" under the 1938 rule,[54] the rights of the parties often were obscured by the problems of categorization.[55]

II. The Current Federal Class Action Rules

As amended in 1966, rule 23[56] was intended to clarify the obscurity and uncertainty which the terminology of the former rule had bred.[57] It also was designed to define the "proper extent of . . . judgments in class actions"[58] by providing that all properly maintained class actions are binding on all class members whether absent or present.[59] The rule

---

[49] Buck v. Gallagher, 307 U.S. 95, 103-04 (1939) ("common and undivided interest"); Alfonso v. Hillsborough County Aviation Authority, 308 F.2d 724, 726 (5th Cir. 1962) ("In order that their claims may be aggregated, the plaintiffs must have an undivided or joint interest in some single claim."); Brotherhood of R.R. Trainmen v. Templeton, 181 F.2d 527, 533 (8th Cir.), *cert. denied*, 340 U.S. 823 (1950) ("conduct . . . directed against them as a class"); Hackner v. Guaranty Trust Co., 117 F.2d 95, 97 (2d Cir.), *cert. denied*, 313 U.S. 559 (1941) ("Aggregation . . . is permitted only when the claims are of a joint nature, as when it is sought to enforce a single title in which the plaintiffs have a common interest."); 3B J. Moore, *supra* note 9, ¶ 23.13, at 23-2951, 23-2957 to -2960; C. Wright, Law of Federal Courts § 36, at 122 (2d ed. 1970); 7 Wright & Miller, *supra* note 46, § 1756, at 553-54.

[50] 3B J. Moore, *supra* note 9, ¶ 23.13, at 23-2953.

[51] Alfonso v. Hillsborough County Aviation Authority, 308 F.2d 724, 726 (5th Cir. 1962); Knowles v. War Damage Corp., 171 F.2d 15 (D.C. Cir. 1948), *cert. denied*, 336 U.S. 914 (1949); Hackner v. Guaranty Trust Co., 117 F.2d 95, 97 (2d Cir.), *cert. denied*, 313 U.S. 559 (1941).

[52] *E.g.*, Thomson v. Gaskill, 315 U.S. 442, 446 (1942).

[53] Troup v. McCart, 238 F.2d 289 (5th Cir. 1956); *see* 7 Wright & Miller, *supra* note 46, § 1756, at 553-54.

[54] *See* Hansberry v. Lee, 311 U.S. 32 (1940), and cases cited in 7 Wright & Miller, *supra* note 46, § 1752, at 518-19; *Proposed Rules of Civil Procedure, R. 23, Advisory Committee's Note*, 39 F.R.D. 98 (1965) [hereinafter cited as *Advisory Committee's Note*].

[55] *See* Deckert v. Independence Shares Corp., 311 U.S. 282 (1940), *discussed in* Z. Chafee, *supra* note 15, at 263-65; 7 Wright & Miller, *supra* note 46, § 1752, at 512 n.39; *Advisory Committee's Note, supra* note 54.

[56] Fed. R. Civ. P. 23.

[57] *Advisory Committee's Note, supra* note 54.

[58] *Id.*

[59] *Id.* at 99; Fed. R. Civ. P. 23(c)(3).

embodies certain threshold tests for determining whether the class action is maintainable.[60] In addition, the class has to fall within one of the categories defined by 23(b).[61] Problems arose soon after enactment, however, concerning both the aggregation of separate claims to meet the $10,000 jurisdictional amount in diversity cases[62] and the type of notice necessary in class actions involving common questions of law or fact.[63]

A. Aggregation

In *Zahn v. International Paper Co.*[64] the United States Supreme Court was faced with deciding

> whether a diversity case [would] be allowed to proceed as a class action under Fed. R. Civ. P. 23(b)(3) when the named plaintiffs meet the jurisdictional amount requirement of 28 U.S.C. § 1332(a) but the unnamed representatives of the class do not.[65]

The Court held that its interpretation of "matter in controversy" in previous decisions,[66] including *Snyder v. Harris*,[67] required that "any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims."[68] The Court reasoned that a contrary result would "undermine the purposes and intent"[69] of Congress' recent increase in the jurisdictional amount,[70] particularly since Congress was probably relying on the Court's previous interpretation of "matter in controversy."

---

[60] FED. R. CIV. P. 23(a).

[61] FED. R. CIV. P. 23(b)(1)-(3).

[62] 28 U.S.C. § 1332 (1970). Because the 1966 amendments of the rules omitted any reference to "joint or common" interest the question of how the aggregation doctrine would be applied in so-called "spurious" [23(b)(3)] class actions was unsettled.

[63] *See* FED. R. CIV. P. 23 (b)(3), (c)(2).

[64] 414 U.S. 291 (1973), *aff'g* 469 F.2d 1033 (2d Cir. 1972), *aff'g* 53 F.R.D. 430 (D. Vt. 1971).

[65] 469 F.2d at 1033.

[66] Clark v. Paul Gray, Inc., 306 U.S. 583 (1939); Scott v. Frazier, 253 U.S. 243 (1920); Pinel v. Pinel, 240 U.S. 594 (1916); Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39 (1911); Steel v. Guaranty Trust Co., 164 F.2d 387 (2d Cir. 1947); Hackner v. Guaranty Trust Co., 117 F.2d 95 (2d Cir.), *cert. denied*, 313 U.S. 559 (1941). *Compare* Lesch v. Chicago & E. Ill. R.R., 279 F. Supp. 908 (N.D. Ill. 1968), *with* City of Inglewood v. City of Los Angeles, 451 F.2d 948 (9th Cir. 1971), *and* Alvarez v. Pan Am. Life Ins. Co., 375 F.2d 992 (5th Cir.), *cert. denied*, 389 U.S. 827 (1967).

[67] 394 U.S. 332 (1969). In *Snyder* the Court decided that changes in the wording of rule 23 as a result of the 1966 amendments had no effect on the inability of class members with "separate and distinct" claims to aggregate their claims. Aggregation would be allowable only where two or more plaintiffs sought "to enforce a single title or right in which they have a common and undivided interest." *Id.* at 335.

[68] 414 U.S. at 300.

[69] *Id.* at 301.

[70] *Id.*

In dissent, Justice Brennan asserted that the aggregation rule should not have been applied in this case. Each of the named plaintiffs asserted damages in excess of the jurisdictional amount;[71] the district court, therefore, had jurisdiction and should have retained the absent members' claims under the concept of ancillary jurisdiction.[72] Under this doctrine, once a court has subject matter jurisdiction, it has discretion to exercise jurisdiction over related claims[73] to prevent "piecemeal litigation."[74] In *Zahn* the claims of the named parties could be heard in federal court; however, other class members must resort to individual actions in state courts,[75] thereby duplicating litigation. *Zahn* may have

---

[71] *Id.* at 292. For critiques of the Court's aggregation analysis, see Note, *Unnamed Plaintiffs in Federal Class Actions: Zahn v. International Paper Co. Further Restricts the Availability of the Class Suit*, 35 OHIO ST. L.J. 190, 203-07 (1974); 4 ENVIR. L. 305 (1974); 10 IDAHO L. REV. 287, 289-92 (1974); 76 W. VA. L. REV. 564, 567 (1974); *see* Brief for Petitioners-Appellants at 13-19, Zahn v. International Paper Co., 414 U.S. 291 (1973).

[72] 414 U.S. at 305-06; *see* Brief for Petitioners-Appellants, *supra* note 71; Note, *supra* note 71, at 206; 62 ILL. B.J. 516, 518 (1974). *But see* United Pacific/Reliance Ins. Cos. v. City of Lewiston, 372 F. Supp. 700 (D. Idaho 1974), where the court said: "It may be concluded that the [*Zahn*] majority rejected the pendent or ancillary approach as a valid basis for jurisdiction in diversity cases where only state and not federal law is invoked . . . ." *Id.* at 704; *cf.* Warren G. Kleban Eng'r Corp. v. Caldwell, 490 F.2d 800, 802 (5th Cir. 1974).

[73] C. WRIGHT, *supra* note 49, § 9; Note, *supra* note 71, at 206; *see* UMW v. Gibbs, 383 U.S. 715 (1966).

[74] 469 F.2d at 1036; 62 ILL. B.J. 516, 518 (1974); *see Advisory Committee's Note, supra* note 54, at 102-03 ("promote uniformity of decisions").

[75] 469 F.2d at 1039. Assuming the plaintiffs win in federal court, the state court litigants probably will be unable to assert collateral estoppel to prevent the defendant from relitigating every issue. Most states still require identity of parties, commonly known as mutuality, as a prerequisite for the use of collateral estoppel. *E.g.*, Mayhew v. Deister, 144 Ind. App. 111, 244 N.E.2d 448 (1969); Adamson v. Hill, 202 Kan. 482, 449 P.2d 536 (1969); Hollowell v. Vito's Trucking & Excavating Co., 386 Mich. 37, 191 N.W.2d 313 (1971); Johnson v. Bagby, 252 Miss. 125, 171 So. 2d 327 (1965); Garraway v. Retail Credit Co., 244 Miss. 376, 141 So. 2d 727 (1962); Annot., 31 A.L.R.3d 1044 (1970). The Mississippi rule has been criticized in Thames, *Mutuality in Collateral Estoppel: Never the Twain Should Meet*, 37 MISS. L.J. 244 (1966); 41 MISS. L.J. 497 (1970). Only a very few states permit an "affirmative" use of collateral estoppel. Watkus v. Pomeroy, 506 P.2d 392 (Colo. Ct. App. 1972); New York State Elec. & Gas Corp. v. Waldron, 72 Misc. 2d 78, 338 N.Y.S.2d 248 (Sup. Ct. 1972); Hart v. American Airlines, Inc., 61 Misc. 2d 41, 304 N.Y.S.2d 810 (Sup. Ct. 1969); B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 147, 255 N.E.2d 195, 198, 278 N.Y.S.2d 596, 601 (1967) ("the 'doctrine of mutuality' is a dead letter"). However, the recent trend away from mutuality was noted with approval in Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 324-29 (1971); *see* Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971); J.M. Woodhull, Inc. v. Addressograph-Multigraph Corp., 62 F.R.D. 58, 61 (S.D. Ohio 1974); 1B J. MOORE & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.412(1), at 92 & n.12 (J. Lucas Supp. 1973).

In Atchley v. Superior Oil Co., 482 S.W.2d 883, 897 (Tex. Civ. App. 1972), the court

discarded the practical approach of *Supreme Tribe of Ben-Hur v. Cauble*,[76] which noted that the retention of nondiverse class members would not defeat diversity. Application of ancillary jurisdiction in this case is as appropriate as in the many other areas where it has been used.[77] The rule 23(b)(3) requirement that the class members' common questions must "predominate over . . . questions affecting only individual members," provides ample assurance that ancillary jurisdiction will not be misused.[78]

Zahn will have a dramatic effect on class actions. At least in diversity actions[79] absent members may have to appear in order to assert the jurisdictional sufficiency of their claims.[80] Such a requirement precludes the availability of class actions because they would no longer be "superior to other available methods" of procedure[81] as required by rule 23. In (b)(3) class suits the named plaintiffs with monetarily sufficient claims can remain in federal court, but others without the requisite jurisdictional amount will be forced to seek redress in state courts where class actions may not be available.[82] Individual claimants may be precluded from asserting an otherwise valid claim because of the inherent expense of a complicated legal struggle.[83] Multiple suits, an increase in the workload of the entire judicial system, and the possibility of inconsistent adjudication are probable consequences of the majority's ruling in *Zahn*.

There are several ways for a perceptive attorney to avoid the prob-

---

said collateral estoppel was not applicable for lack of mutuality in a land dispute, but applied stare decisis since it "does not depend upon identity of the parties." *See also* Southland Co. v. McDonald, 225 Miss. 19, 82 So. 2d 448 (1955).

[76] 255 U.S. 356 (1921).

[77] 414 U.S. at 305-06; United Pacific/Reliance Ins. Cos. v. City of Lewiston, 372 F. Supp. 700, 704 (D. Idaho 1974) ("practicalities . . . point to the exercise of jurisdiction").

[78] 414 U.S. at 306-07. In addition, assertion of ancillary jurisdiction would not affect the validity of *Snyder*, which would still apply when *no* class members meet the jurisdictional requirement. 62 ILL. B.J. 516, 518 (1974).

[79] The decision will affect even class actions in which general federal question jurisdiction is invoked, which, unless specifically excepted, also must meet the $10,000 jurisdictional amount. 414 U.S. at 302 n.11; *see* Brundt v. Owens-Illinois, Inc., 62 F.R.D. 160, 169 (S.D.N.Y. 1973); Comment, *Closing the Courthouse Door: The Aftermath of Snyder v. Harris*, 68 NW. U.L. REV. 1011, 1019-20 (1974); 76 W. VA. L. REV. 564 (1974). *But see* 26 BAYLOR L. REV. 123, 131 (1974); 4 ENVIR. L. 305, 311 (1974). One noted author has said, "[A] series of particular statutes grant jurisdiction, without regard to the amount in controversy, in virtually all the areas that otherwise would fall under the general federal question statute." C. WRIGHT, *supra* note 49, § 32, at 108.

[80] 53 F.R.D. at 433; 4 ENVIR L. 305, 312 (1974); 10 IDAHO L. REV. 287, 292 (1974).

[81] Note 80 *supra*; *see* FED. R. CIV. P. 20.

[82] Bangs, *Revised Rule 23: Aggregation of Claims for Achievement of Jurisdictional Amount*, 10 B.C. IND. & COM. L. REV. 601, 611 (1969); Comment, *supra* note 79, at 1023; 76 W. VA. L. REV. 564, 569 (1974).

[83] 414 U.S. at 307-09; Note, *supra* note 71, at 208; 76 W. VA. L. REV. 564, 569 (1974).

lems surrounding *Zahn*'s interpretation of jurisdictional amount. In interstate pollution cases, it may be possible to invoke federal common law jurisdiction,[84] bypassing jurisdictional amount problems.[85] In addition, the court would have power to fashion either an injunctive or a pecuniary remedy under the power conferred by federal common law.[86] A party could also allege that his action arose "under any Act of Congress regulating commerce . . . against restraints and monopolies."[87] In that event section 1337[88] would provide the federal district court with jurisdiction regardless of the amount in controversy.[89] This section often has been used to bring private actions in federal court under various federal acts.[90] This jurisdictional statute, however, is not always available.[91] Before a private right of action can be implied there should be:

> (1) a Federal statutory or constitutional prohibition against the acts complained of; (2) inclusion of the defendant in the class upon which the duty of statutory compliance has been imposed; (3) legislative intent to place the party claiming injury within the ambit of the statute's protection or to confer a substantive benefit or immunity upon him; (4) injury or threatened harm proximately resulting from the defendant's

---

[84] *See* Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957).

[85] Illinois v. City of Milwaukee, 406 U.S. 91, 98-99 (1972).

[86] *See* Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957).

[87] 28 U.S.C. § 1337 (1970).

[88] *Id.*

[89] 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE WITH FORMS § 38, at 201 n.95 (C. Wright rev. 1960) [hereinafter cited as BARRON & HOLTZOFF].

[90] Acts through which section 1337 jurisdiction has been asserted successfully include:

Interstate Commerce Commission Regulations—In Appleton Electric Co. v. Advance-United Expressways, 494 F.2d 126 (7th Cir. 1974), a class action was brought on behalf of several million shippers. *Zahn* was held inapplicable. *Id.* at 133 n.10. Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140 (1974) (*Eisen III*), was distinguished. *Id.* at 135-37.

Food Stamp Act—Giguere v. Affleck, 370 F. Supp. 154, 157 (D.R.I. 1974).

Truth-in-Lending Act—Beard v. King Appliance Co., 61 F.R.D. 434 (E.D. Va. 1973); Richmond v. Railey's Appliance Center, Inc., 59 F.R.D. 641 (E.D. Va. 1973); *see* Note, *Class Actions Under the Truth in Lending Act*, 83 YALE L.J. 1410 (1974).

Sherman Anti-Trust Act—Merola v. Atlantic Richfield Co., 493 F.2d 292 (3d Cir. 1974).

For a list of other areas, see 1 BARRON & HOLTZOFF, *supra* note 89, § 38, at 53-54 (C. Wright & F. Elliot Cum. Supp. 1973).

[91] Areas in which 1337 jurisdiction has been held inapplicable include:

Railway Passenger Service Act of 1970 (Amtrak Act)—National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974).

Consumer Credit Protection Act—Western v. Hodgson, 494 F.2d 379, 380 (4th Cir. 1974).

Federal Trade Commission Act—Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973); Carlson v. Coca Cola Co., 483 F.2d 279 (9th Cir. 1973).

breach of duty; (5) unavailability or ineffectiveness of alternative avenues of redress.[92]

Of course, the plaintiff may also avoid all jurisdictional amount requirements[93] by asserting an action under the Civil Rights Act of 1871.[94]

B. Notice

Rule 23(c)(2) of the federal rules requires that notice be directed to class members in all (b)(3) class suits. The notice should be "the best practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[95] The rule, however, does not specify who should pay for the notice. In addition, the rule does not make clear whether the size of the class and the adequacy of representation might make individual notice unnecessary.

These often-discussed questions eventually were answered in *Eisen v. Carlisle & Jacquelin*,[96] a class suit which had been in the courts since the adoption of the new rules.[97] Morton Eisen, a New York resident, brought a class action against Carlisle & Jacquelin and DeCoppet & Doremus, the two major "odd-lot"[98] dealers on the New York Stock Exchange. Eisen alleged in this 23(b)(3) action that the two firms had monopolized odd-lot trading and charged excessive fees.[99] He claimed that these practices operated to the detriment of his entire class, some 6 million traders.[100] The suit sought treble damages as provided by the Sherman Anti-Trust Act.[101]

The Supreme Court held that rule 23(c)(2) requires that: "Individual notice must be sent to all class members whose names and addresses

---

[92] Holloway v. Bristol-Myers Corp., 485 F.2d 986, 989 (D.C. Cir. 1973).

[93] 28 U.S.C. § 1343 (1970); *see, e.g.*, J.A. v. Riti, 377 F. Supp. 1046 (D.N.J. 1974); Mathias v. City of Milwaukee Dep't of City Dev., 377 F. Supp. 497 (E.D. Wis. 1974); Lynch v. Public Service Comm'n, 376 F. Supp. 1033 (D. Nev. 1974).

[94] 42 U.S.C. § 1983 (1970).

[95] FED. R. CIV. P. 23(c)(2).

[96] 94 S. Ct. 2140 (1974), *vacating* 479 F.2d 1005 (2d Cir. 1973), *rev'g* 54 F.R.D. 565 (S.D.N.Y. 1972), *and* 52 F.R.D. 253 (1971).

[97] For a discussion of the history and possible impact of *Eisen*, see Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426 (1973).

[98] Odd lots are units of stock traded in amounts less than the normal 100-share lots. An additional fee, known as the "odd-lot differential," is charged by the odd-lot dealers in every transaction. Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147, 148 (S.D.N.Y.), *appeal allowed*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). The two firms in question handle 99 percent of all the odd-lot business on the New York Stock Exchange. 94 S. Ct. at 2144.

[99] 94 S. Ct. at 2144.

[100] Approximately 2 million of these traders could be identified by name and address, by searching the computerized records of the two firms. *Id.* at 2147 & n.5.

[101] *Id.* at 2144.

may be ascertained through reasonable effort."[102] The Court's decision was based on the express language of the rule, the Advisory Committee's Note to rule 23,[103] and two earlier cases.[104] Neither the prohibitive cost of such notice,[105] nor the almost insignificant amount of each claim[106] precluded the "unambiguous requirement" that each identifiable class member receive individual notice.[107] In addition, the Court held that since there was no fiduciary relation between the parties, the usual rule would require the plaintiff to pay for notice to the class. Since the plaintiff understandably had refused to bear this expense, the suit was dismissed as a class action.[108]

Requiring individual notice seems justifiable to ensure that the class members will be aware that litigation is being conducted which affects their monetary interests. The notice requirement was designed to protect the rights of absent class members[109] and to comply with due process requirements.[110] Because (b)(3) suits are binding on all members of the class,[111] notice is necessary both to justify the resulting res judicata effect[112] and to allow members to "opt out" of the class if they so desire.[113] The notice, therefore, should inform each class member of the

---

[102] *Id.* at 2150. The Court specifically reserved judgment on the validity of "fluid class recovery." *Id.* at 2150 n.10. This controversial theory was developed by the district court in an attempt to resolve problems concerning distribution of damages. 52 F.R.D. at 265. The Second Circuit Court of Appeals rejected the "fluid recovery" idea. 479 F.2d at 1008. For further discussion on this subject, see Grossman, *Class Actions: Manageability and the Fluid Recovery Doctrine*, 47 L.A.B. Ass'n Bull. 415 (1972); Malina, *Fluid Class Recovery As a Consumer Remedy in Antitrust Cases*, 47 N.Y.U.L. Rev. 477 (1972); Comment, *Due Process and Fluid Class Recovery*, 53 Ore. L. Rev. 225 (1974); Note, *Notice and Fluid Class Recovery in Rule 23(b)(3) Class Actions*, 8 Suffolk U.L. Rev. 85 (1973); 73 Colum. L. Rev. 1641 (1973); 1973 Utah L. Rev. 489.

[103] *Advisory Committee's Note, supra* note 54, at 106-07.

[104] Schroeder v. City of New York, 371 U.S. 208 (1962); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

[105] Individual notice to all 2 million identifiable class members would cost $315,000. 94 S. Ct. at 2147 & n.7.

[106] Eisen's claim was only $70. *Id.* at 2144. The approximate average claim was $3.90, 479 F.2d at 1010, although the total amount of damages claimed was between $22 and $120 million. *Id.* at 1009.

[107] 94 S. Ct. at 2152.

[108] *Id.* at 2153.

[109] Ward & Elliot, *The Contents and Mechanics of Rule 23 Notice*, 10 B.C. Ind. & Com. L. Rev. 557, 567 (1969).

[110] 20 Wayne L. Rev. 943, 946 (1974); *see* Schroeder v. City of New York, 371 U.S. 208 (1962); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Hansberry v. Lee, 311 U.S. 32 (1940).

[111] Fed. R. Civ. P. 23(c)(3).

[112] *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 392 (1967); 20 Wayne L. Rev. 943, 946 (1974).

[113] Kaplan, *A Prefatory Note*, 10 B.C. Ind. & Com. L. Rev. 497, 499 (1969); *Advisory*

right to be excluded from the class or to enter an appearance by counsel, and that the action will be binding should he fail to request exclusion.[114]

The Court also was correct in holding that the plaintiff usually should bear the cost of notice.[115] A defendant, if required to send notice prior to determination of liability, is not assured of recovering this expense even if he prevails.[116] Since the plaintiff initiates the action, he normally should pay for notice to other class members in the absence of any fiduciary relation to the adversary.[117]

The effect of the Court's holdings will be to "close the courthouse door" to all large, consumer class actions[118] regardless of their merit. Whether a class action can be maintained will depend directly on two variables, the size of the class injured and the size of the representative's claim. As the former increases and the latter decreases, the feasibility of class suits will diminish with the rising notice costs.[119] Class actions will be limited to small classes[120] or to suits brought by litigants wealthy enough to pay for such notice.[121] By requiring that notice be sent to all whose names and addresses are readily available, the Court has given defendants a tool for blocking all large consumer suits. Many defendants

---

Committee's Note, supra note 54, at 105; *see* Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147, 151 (S.D.N.Y. 1966).

Although the Court in *Eisen* specifically held that rule 23's (c)(2) notice provision was inapplicable to (b)(1) and (b)(2) suits, 94 S. Ct. at 2152 n.14, some courts have continued to require the plaintiff to mail individual notice to known members of a class and to have published notice for the unknown members of a class in (b)(2) actions. *E.g.*, Newman v. Arco Corp., 43 U.S.L.W. 2136 (M.D. Tenn. Sept. 6, 1974) ("[I]f there is no notice, there is no class action."); Brandt v. Owen-Illinois, Inc., 62 F.R.D. 160, 171 (S.D.N.Y. 1974); Arnold v. Ballard, 7 E.P.D. ¶ 9114, at 6672 (N.D. Ohio 1974). *But see* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969); Johnson v. City of Baton Rouge, 50 F.R.D. 295 (E.D. La. 1970) (notice is discretionary in (b)(2) suits).

[114] FED. R. CIV. P. 23(c)(2). For a sample notice form, see Ward & Elliot, *supra* note 109, at 570.

[115] 479 F.2d at 1009; Kaplan, *supra* note 112, at 398 n.157; Ward & Elliot, *supra* note 109, at 566; 20 WAYNE L. REV. 943, 952 (1974).

[116] 5 LOYOLA (CHI.) L.J. 264, 280 (1974); 27 OKLA. L. REV. 70, 73 (1974).

[117] *See* Dolgow v. Anderson, 43 F.R.D. 472, 498-500 (E.D.N.Y. 1968).

As a way for the plaintiff to avoid the costs of notice, see Sayre v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 43 U.S.L.W. 2194 (E.D. Pa. Oct. 11, 1974), which allowed the plaintiff's attorney to pay notice costs.

[118] *E.g.*, Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971); Ward & Elliot, *supra* note 109, at 565; Note, *Eisen v. Carlisle & Jacquelin - Fluid Recovery, Minihearings and Notice in Class Actions*, 54 B.U.L. REV. 111, 136 (1974); Comment, *Notice, Preliminary Hearings, and Manageability in Federal Class Actions*, 11 HOUSTON L. REV. 121, 135 (1973); 4 CUMB. SAM. L. REV. 401, 407 (1973).

[119] *See* 1973 WIS. L. REV. 301, 308.

[120] DRAKE L. REV. 465, 470 (1974).

[121] Note, *supra* note 118, at 142; 5 LOYOLA (CHI.) L.J. 264, 281 (1974). *But see* Appleton Elec. Co. v. Advance-United Expressways, 494 F.2d 126 (7th Cir. 1974).

no doubt will volunteer to furnish the names and addresses of all members of a large class whenever possible, regardless of the effort, in hopes of aborting the action by saddling the plaintiff with prohibitive notice costs.[122] The effect is to preclude the consumer plaintiff from using a class action remedy.[123] This result is especially undesirable when the equitable purposes of the (b)(3) action are considered. This action was designed to reduce litigation by combining many individual actions,[124] thereby promoting both economy and uniformity of result.[125] The rule was meant to provide a remedy for large classes of consumers with similar small claims,[126] even at the risk of occasionally increasing litigation, because often individual plaintiffs with such small claims would not be able to bring a separate suit. Without 23(b)(3) actions, defendants similar to those in *Eisen* will be allowed to keep their allegedly illegal gains.[127]

All the advantages of allowing a (b)(3) action, however, do not accrue to the plaintiff. Defendants would be saved the expense and burden of defending many separate suits. The risk of inconsistent adjudication is eliminated for the defendant as well, and the successful defendant ends the litigation with one suit.[128] The courts, therefore, should take a more practical approach when deciding whether a class action should be allowed.

Eisen's effect no doubt will be heralded by those who consider large consumer actions "legalized blackmail."[129] Some say such actions are only beneficial to the attorneys who bring them.[130] The reasons for limiting the efficacy of large class actions were recently explained by the Second Circuit Court of Appeals:

> Class actions have sprouted and multiplied like the leaves of the green bay tree. No matter how numerous or diverse the so-called class may be or how impossible it may be ever to compensate the individual

---

[122] Brief for Petitioner at 34, Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140 (1974); Note, *The Manageability Crisis of Consumer Class Actions: The Severe Example of Eisen III*, 7 IND. L. REV. 361, 387 (1973).

[123] Note, *supra* note 122, at 395; *see* Note, *supra* note 118, at 143.

[124] Kaplan, *supra* note 113, at 497.

[125] Kaplan, *supra* note 112, at 390.

[126] *Advisory Committee's Note, supra* note 54, at 104; Kaplan, *supra* note 113, at 497; Maraist & Sharp, *After Snyder v. Harris: Whither Goes the Spurious Class Action?*, 41 MISS. L.J. 379, 393(1970); Ward & Elliot, *supra* note 109, at 565. *But see* Handler, *supra* note 2, at 10.

[127] Note, *supra* note 122, at 378.

[128] Comment, *Allocation of Initial Notice Costs Under Federal Rule 23(c)(2),* 1973 U. ILL. L.F. 723.

[129] Handler, *supra* note 2, at 9.

[130] Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 570 (2d Cir. 1968) (Lumbard, C.J., dissenting); Handler, *supra* note 2, at 10.

> members of the class, a champion steps forth. Thus class actions have been brought on behalf of all subscribers of business telephones in New York County, all Master Charge credit card holders similarly situated, all consumers of gasoline in a given state or states, all homeowners in the United States . . . . [T]he huge and unavoidable expense[s] . . . have brought such pressure on defendants as to induce settlements in large amounts as the alternative to complete ruin and disaster, irrespective of the merits of the claim.[131]

C. Alternatives to Aggregation and Notice Requirements

Apparently the Supreme Court adopted the above sentiments in *Snyder, Zahn,* and *Eisen* in order to resurrect the "spurious" class action[132] which 23(b)(3) was to replace. These three decisions point toward at least one conclusion: Whenever a large class action is attempted, the present Court will use all established procedural barriers to restrict the action's viability. The Court is motivated by an understandable attempt to prevent federal courts from being swamped by unwieldy, frivolous class suits.[133] It seems, however, that the Court has "thrown the baby out with the bath water." Rule 23 purposefully provides certain conditions and considerations for determining the appropriateness of the class suit. The court must consider "the difficulties likely to be encountered in the management of a class action."[134] Under this test, *Eisen* may well be considered "unmanageable";[135] for what could be less manageable than a class of some 6 million people and institutions scattered throughout the world? This extreme example, however, should not be the basis for denying this useful device in situations where the class is not so large and "the amounts at stake for individuals [are] so small that separate suits would be impracticable."[136]

Even in cases where the class of injured parties is composed of 6 million potential claimants, the rules provide an alternative to an unmanageable suit. As suggested by the majority in *Eisen*[137] and discussed by Justice Douglas in a separate opinion,[138] rule 23(c)(4) provides for dividing the class into subclasses. The subclass is to be treated like any other class, with notice required to those members who are readily deter-

---

[131] Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1018 (2d Cir. 1973) (footnotes omitted).

[132] *See* Kaplan, *supra* note 113, at 497-98.

[133] *See* Handler, *supra* note 2, at 11; Note, *supra* note 118, at 144.

[134] FED. R. CIV. P. 23(b)(3)(D).

[135] *See* Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147, 152 (S.D.N.Y. 1966).

[136] *Advisory Committee's Note, supra* note 54, at 104.

[137] Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140, 2153 n.16 (1974).

[138] *Id.* at 2153 (Douglas, J., with whom Brennan & Marshall, JJ., concur, dissenting in part).

minable. With use of this tool, notice costs may no longer be prohibitive. Problems of nonmanageability often would disappear.[139] Moreover, in light of a recent case,[140] the start of such a class action probably would toll the applicable statute of limitations.[141] Certain questions may still arise.[142] Since 23(c)(4)(B) specifically provides for subclasses, however, these problems should not be insurmountable.[143] An appropriately defined subclass would negate most criticisms of large class suits and ensure that the "class action serves not only the convenience of the parties but also prompt, efficient judicial administration."[144]

Another alternative, where the defendant consents, is to use a test case and delay the class action determination until liability has been determined. In *Katz v. Carte Blanche Corp.*,[145] the Third Circuit Court of Appeals discussed this alternative. Although judgment against the plaintiff would not bind the other prospective class members, the defendant may utilize stare decisis rather than res judicata to protect its interests.[146] An adverse judgment would probably deter future litigation. If the defendant were found liable, a class determination then could be made and class members permitted to intervene.[147] Notice could be directed by the defendant to all potential claimants as required by 23(c)(2), allowing them to opt out but advising them of the judgment.[148] The class representative would not be required to pay for the notice, making it much easier for him to maintain the suit.[149] Any difficulty the plaintiff may have in retaining an attorney should be mitigated by the apparent validity of his claim and, in some cases, by statutes providing for reasonable attorneys' fees.[150] Finally, the test case may be used only with the defendant's consent and when the defendant is able to show that a class determination and subsequent notice will prejudice or harm his business.[151]

Katz and the subclass provision may also be used in combination to circumvent the *Eisen* notice problem. By using the subclass provi-

---

[139] *Id.* at 2154.

[140] American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974).

[141] *See* 94 S. Ct. at 2154 & n.2.

[142] *Id.* at 2154 & n.3.

[143] *Id.* at 2154-55.

[144] *Id.* at 2156 (footnote omitted).

[145] 496 F.2d 747, 758 (3d Cir. 1974).

[146] *Id.* at 759.

[147] *Id.; see* Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 588-89 (10th Cir. 1961), *cert. denied*, 371 U.S. 801 (1963).

[148] 496 F.2d at 760.

[149] *Id.* at 761.

[150] *See, e.g.*, 15 U.S.C. §§ 15, 1640(a)(2) (1970).

[151] 496 F.2d at 762.

sion, the class-action attorney can ensure that the notice cost of his potential (b)(3) class will not preclude the action. The large corporate defendant, recognizing this fact, may readily agree to the *Katz* procedure of delaying class determination and the requisite notice until after a determination of liability. By postponing class determination, the defendant will be able to use all its delaying tactics in hope of wearing down the single plaintiff; this possibility is more probable when there is only one plaintiff than when there is a substantial class capable of financing prolonged litigation.

Another alternative to the use of a 23(b)(3) class action would be the creation of a state or federal agency which could bring suit on behalf of large classes.[152] An agency, however, probably could seek only injunctive relief and would not be able to recover the profits unjustly accumulated by the defendants.[153]

If the recent decisions are viewed as an implementation of comity, that is, of the federal system deferring to the states to implement the enforcement of the substantial policy consideration underlying class actions, the development of a viable, efficient state class action remedy becomes imperative.[154]

III. Multiparty Suits in Mississippi

Suits by or against multiple parties asserting individual rights, having evolved from the bill of peace, remained the exclusive domain of equity jurisdiction.[155] This presented the threshold problem of bringing the multiparty suit into equity. In Mississippi, as in the rest of the nation, suits brought in equity by or against multiple parties on the asserted equitable grounds of the prevention of a multiplicity of actions

---

[152] Congress' latest attempt to create some sort of "consumer agency" was tabled this session following four futile attempts to cut off a filibuster. 120 Cong. Rec. S17,413 (daily ed. Sept. 24, 1974). For the text of S. 707, see *id.* S5746-50 (daily ed. Apr. 11, 1974). The House version, H.R. 13163, was passed by a vote of 293 to 94, with all five Mississippi Congressmen voting against it. *Id.* H2564 (daily ed. Apr. 3, 1974). For a discussion of the federal legislation, see *Hearings on Consumer Class Actions Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. (1971); *Hearings on Class Action and Other Consumer Protection Procedures Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. (1970); *Hearings on the Class Action Jurisdiction Act Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969); Leighton, *Consumer Protection Agency Proposals: The Origin of the Species*, 25 Ad. L. Rev. 269 (1973); Note, *Consumer Protection Legislation: Another Consumer Fraud*, 60 Geo. L.J. 113 (1971).

[153] 1973 Wis. L. Rev. 301, 306.

[154] See Maraist & Sharp, *supra* note 126, at 392.

[155] *See* part I *supra*.

often suffered uncertain reception.[156] Pomeroy, in his treatise on equity jurisprudence, advocated that the prevention of a multiplicity of suits constitutes an independent ground of equity jurisdiction.[157] Further, Pomeroy argued that this is true even where there is a community of interest among the multiple plaintiffs or defendants only in questions of fact and law.[158] The treatise became a rallying point for those preferring this liberal approach to multiparty actions. Such a general and seemingly novel assertion made inevitable an equally able counterassertion. Claiming the blessings of precedent and asserting the heresy of Pomeroy's position, the Mississippi Supreme Court, in *Tribette v. Illinois Central Railroad Co.*,[159] adroitly raised the standard around which gathered the legal purists who would grant multiparty suits only upon much narrower grounds. The court maintained that there existed no independent jurisdictional ground in equity for the prevention of a multiplicity of suits.[160]

A. The Tribette Case

Since the *Tribette* reasoning is the origin of the law in this state on multiparty actions, it deserves close examination. The case grew from the claims of several homeowners that sparks from a train passing through their small town had set fire to their property. The property owners brought actions at law for damages. The railroad entered chancery court seeking a decree enjoining further suits based on this incident and joining the present suits in law as one suit in chancery in order to

---

[156] *Id.*; *see, e.g.*, J. Pollock & Co. v. Okolona Sav. Inst'n, 61 Miss. 293 (1883) (allowing a multiparty action on these grounds). *Contra*, Tribette v. Illinois Cent. R.R., 70 Miss. 182, 12 So. 32 (1892). *See also* V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 439 (2d ed. 1950) [hereinafter cited as GRIFFITH]; 1 POMEROY, *supra* note 13, § 244; Kimbrough, *The Tribette Case*, 12 MISS. L.J. 134, 134-38 (1939).

[157] 1 POMEROY, *supra* note 13, §§ 244-74.

[158] *Id.*

[159] 70 Miss. 182, 12 So. 32 (1892), *noted in* 14 HARV. L. REV. 611 (1901).

[160] *Id.* at 188, 12 So. at 32-33. Earlier, in J. Pollock & Co. v. Okolona Sav. Inst'n, 61 Miss. 293 (1883), the Mississippi Supreme Court had expressly accepted Pomeroy's doctrine. The court stated:

> [I]t may be considered as settled that for the purpose of preventing a multiplicity of suits, a court of equity may draw to itself the ultimate decision of many actions at law, where the suits are by one against many or by many against one, all the cases depend upon a common state of facts and upon a common principle of law, which will govern and control the rights of all, although there be no community of right between the several parties and their demands arise at different times.

Id. at 296-97. Informative notes on the *Tribette*-Pomeroy controversy may be found at 16 MINN. L. REV. 679 (1932); 68 U. PA. L. REV. 167 (1920); 62 U. PA. L. REV. 452 (1914); 3 VA. L. REV. 545 (1916).

prevent the burden of multiple suits upon both the railroad and the courts. The injunction was granted by the chancellor, but the Mississippi Supreme Court reversed the decision and dissolved the injunction, thus allowing the continuance of separate suits at law by the injured parties.[161] The railroad, of course, had relied upon Pomeroy's doctrine and earlier Mississippi case law[162] which held that the prevention of a multiplicity of suits provided adequate grounds to bring the suits into the equity courts for adjudication. The court recognized that Pomeroy's treatise provided direct support for the complainant's argument but felt that Pomeroy's doctrine was faulty for two reasons. First, the *Tribette* court believed that in each case cited by Pomeroy as supporting his doctrine there had been other independent equitable grounds for bringing the case into the equity courts. Once in equity, the cases could be properly joined, as it is the duty of equity to prevent a multiplicity of suits by joining such equitable actions. In *Tribette*, however, the grounds for the action were purely at law; it was beyond the power of the chancery court to bring such actions into equity solely on the ground of preventing multiple suits.[163] Second, precedent demanded that there be a "community of interest" among the multiple parties in the suit greater than the common questions of law and fact which might exist.[164] Summing up its argument against Pomeroy, the court held:

> There must be some recognized ground of equitable interference in the subject-matter of the controversy, or common right or title involved, to warrant the joinder of all in one suit . . . it is not enough that there "is a community of interest merely in the question of law or fact involved . . . ."[165]

The court noted that acceptance of Pomeroy's doctrine would produce undesirable results. For example, in the case of a disaster affecting many persons, which was caused by the negligence of another party, the injured parties could be forced to bring their action together before a chancellor and thus forfeit their constitutionally guaranteed right of having their damages determined by a jury.[166]

---

[161] 70 Miss. at 185-86, 12 So. at 32.

[162] J. Pollock & Co. v. Okolona Sav. Inst'n, 61 Miss. 293 (1883).

[163] 70 Miss. at 188-91, 12 So. at 32-33. In a later edition of Pomeroy's treatise, these accusations of miscitation were strongly rebutted. *See* 1 POMEROY, *supra* note 13, § 264a n.20.

[164] 70 Miss. at 188-92, 12 So. at 32-34. For a discussion of the meaning of a "community of interest," see notes 15 through 19 and accompanying text *supra*. For further discussion of Pomeroy's "tactical errors," see Z. Chafee, *supra* note 13, at 1313-15.

[165] 70 Miss. at 188, 12 So. at 32-33.

[166] *Id.* at 190-91, 12 So. at 33-34.

In the second edition of *Pomeroy*, edited by the original author's son, Professor Pomeroy, Jr., the *Tribette* decision received considerable attention. The editor expounded on

B. *The Limits of the Rule*

It is a recognized precept of the *Tribette* doctrine that the cases involving multiple complainants or defendants may be joined where there are independent grounds in equity upon which several complainants have come into court or upon which several defendants have been brought into court.[167] The entry into equity is not based on avoidance of a multiplicity of suits but is based on the other, original equitable grounds. Having gained entry into equity, the suits must be joined by the equity court in order to prevent a multiplicity of suits where there exists the requisite community of interest among the multiple party members.[168] The *Tribette* line of cases may not always require that the individual suits be brought in chancery upon equitable grounds but rather that there are grounds in equity upon which the suit *could* have been brought.[169] If this is true, the chancery courts have great discretion

---

the theory of the original author, narrowed it from what it had appeared to say, and stated his qualified agreement with the holding of *Tribette* but not with the opinion. Pomeroy, Jr., noted that if the only issue had been the complainant's negligence, upholding the injunction would have avoided a multiplicity of suits. It appeared to him from the opinion, however, that the complainant had brought into question the contributory negligence of some of the parties. If this was true, a separate issue as to each of the injured parties would have to be decided. That being so, nothing could be saved by joining the suits. For further discussion of this approach of case-by-case balancing of the possible efficiency of settling the central issue in one trial against the need for separate hearings for separate issues pertaining to individual parties, see H. GIBSON, EQUITY § 149 (2d ed. 1916); H. MCCLINTOCK, PRINCIPLES OF EQUITY § 178 (2d ed. 1948) [hereinafter cited as MCCLINTOCK]; Z. Chafee, *supra* note 13, at 1321-32; Eliot, *The Jurisdiction of Equity Relating to Multiplicity of Suits*, 24 YALE L.J. 642, 644-46 (1915). This rationale lies behind the various statutory provisions for class actions. *See* part IV *infra*.

Other Mississippi cases following the *Tribette* rule and denying consolidation of cases, usually where there is a single, past nonrecurring injury to a number of parties, are Mississippi Power Co. v. Ballard, 166 Miss. 631, 146 So. 874 (1933); Miller v. White, 160 Miss. 32, 133 So. 144 (1931); Henry v. Donovan, 148 Miss. 278, 114 So. 482 (1927); Newell v. Illinois Cent. R.R., 106 Miss. 182, 63 So. 351 (1913); New Orleans, M. & C.R.R. v. Martin, 105 Miss. 230, 62 So. 228 (1913); Gulf & S.I.R.R. v. Walker, 103 Miss. 836, 60 So. 1014 (1913); Newton Oil & Mfg. Co. v. Sessum, 102 Miss. 181, 59 So. 9 (1912).

[167] Tribette v. Illinois Cent. R.R., 70 Miss. 182, 187-88, 12 So. 32, 32-33 (1892); GRIFFITH, *supra* note 156, § 439.

[168] Fortenberry v. Wilkerson, 222 Miss. 70, 73, 75 So. 2d 274, 275 (1954); *see* Tribette v. Illinois Cent. R.R., 70 Miss. 182, 187-88, 12 So. 32, 32-33 (1892); GRIFFITH, *supra* note 156, §§ 139, 203, 375. It should be noted that the "community of interest" standard required for the consolidation of suits already in the equity court is not as strong a common bond as the community of interest standard which the Mississippi Supreme Court has said will gain multiple suits at law entry into chancery to avoid a multiplicity of suits. For a discussion of this lesser standard, see *id.* § 139.

[169] *Cf.* Stigall v. Sharkey County, 197 Miss. 307, 20 So. 2d 664 (1945).

This can also be deduced from the fact that the court in *Tribette* distinguished many

to allow multiparty suits to be brought in chancery, even where the pleadings are based in law.

As was stated in *Tribette*, a "community of interest" among the multiple complainants or defendants is required before multiple actions at law can be consolidated in chancery.[170] What constitutes a community of interest is at the center of the conflict between the liberal allowance of multiparty suits and the narrow approach exemplified by *Tribette*.[171] Those who claim that there must be more than a mere community of interest in common questions of law and fact have failed to define the phrase substantially. Although some early suits appear to require a community of property interest (privity),[172] authorities had urged that the presence of privity in those cases was merely coincident to the holding and not determinative of the case.[173] Rather than demanding a minimum community of interest, Mississippi's decisions generally have stated only that there must be more than just a community of interest in common questions of law and fact.[174] What is

---

of the cases upon which Pomeroy relied by reasoning that the complainants had had equitable grounds for their suit even though the suits may not have been brought or decided on those grounds. *See* Tribette v. Illinois Cent. R.R., 70 Miss. 182, 188-89, 12 So. 32, 33 (1892). Later, the court also distinguished an early Mississippi case, J. Pollock & Co. v. Okolona Sav. Inst'n, 61 Miss. 293 (1883), in a similar fashion. *See* Cumberland Tel. & Tel. v. Williamson, 101 Miss. 1, 57 So. 559 (1912).

[170] *See, e.g.*, Tribette v. Illinois Cent. R.R., 70 Miss. 182, 12 So. 32 (1892). *But see* Illinois Cent. R.R. v. Garrison, 81 Miss. 257, 32 So. 996 (1902) (linkage was a "common right" between the railroad complainant and each of the several defendants).

[171] The question received a good, concise discussion in Yuba Consol. Gold Fields v. Kilkeary, 206 F.2d 884 (9th Cir. 1953). The court there posed the inquiry:

> Is it necessary that the common bond or interest be a community of interest in the subject matter of the controversy to such an extent as to create a *privity between the individual members of the group*, as well as between each of them and the single adversary party? Or is it sufficient that the common bond or interest consists solely in the fact that the claims of the members of the group have arisen from the same source and all involve and depend upon similar questions of law and fact, so that while the same positive relation exists between the single party on the one side and *each* individual member of the group on the other, *no such legal relation exists between the individual members themselves*?

Id. at 888. The court went on to adopt the broader view, requiring less of a bond among multiple parties than is required in Mississippi. *See also* 1 POMEROY, *supra* note 13, § 255.

[172] *E.g.*, How v. Tenants of Bromsgrove, 23 Eng. Rep. 277 (1681) (tenants' rights to manorial commons). *But see* Mayor of York v. Pilkington, 25 Eng. Rep. 946 (1737) (prescriptive rights of fishermen to fish in river owned by manorial lords).

[173] 1 POMEROY, *supra* note 13, § 256; Z. Chafee, *supra* note 13, at 1309.

[174] *See, e.g.*, Barrett v. Coullet, 263 So. 2d 764 (Miss. 1972); Tribette v. Illinois Cent. R.R., 70 Miss. 182, 12 So. 32 (1892). *See also* Crocker v. Farmers & Merchants Bank, 293 So. 2d 438 (Miss. 1974) (class suit in cross bill by directors of bank against other directors of bank on behalf of all shareholders: although the bill alleged damages because of a decrease in the price of the shares of stock, there was no community of interest in the issue

required apparently lies somewhere between a merely formal community of interests in common questions of law and fact and actual privity.

C. *The Exceptions to the Rule*

The *Tribette* doctrine, unexpurgated, maintains that there can never be a consolidation of suits in equity unless, as discussed above, there is either an independent basis in equity for each of the suits or a community of interest.[175] Such conclusive statements are wont to suffer exceptions.[176] The primary exceptions to the *Tribette* doctrine are those cases where the injury is a continuing one and where the interests derive from a common source. For a short time, there was also an exception for insurance cases where a party insured by several companies brought separate suits at law against the companies after his property had been damaged.[177]

---

of the case—an agreement by the cross-filing directors not to seek control of the bank); GRIFFITH, *supra* note 156, § 139.

The cases at note 181 *infra* say that common suffering of a continuing injury is enough to constitute a community of interest. Also the cases at note 183 *infra* appear to say that where the parties' interest or liability flows from a common source there is a community of interest. In *Tribette* and more recent cases the following passage is repeated and apparently is intended to be definitive of what is required as a community of interest:

> Two or more owners of mills propelled by water are interested in preventing an obstruction above that shall interfere with the downflow of the water, and may unite to restrain or abate it as a nuisance; but they cannot, hence, unite in an action for damages, for as to the injury suffered, there is no community of interest. There is no more a common interest than though a carrier had, at one time, carelessly destroyed property belonging to different persons, or the lives of different passengers.

Barrett v. Coullet, 263 So. 2d 764, 767 (Miss. 1972); Tribette v. Illinois Cent. R.R., 70 Miss. 182, 192, 12 So. 32, 34 (1892); *paraphrased in* Evans v. Progressive Cas. Ins. Co., 300 So.2d 149 (Miss. 1974). This analogy appears to show with some clarity what is required, but many cases seem to be altogether in contrast to it. *See, e.g.*, Henry v. Mobile & O.R.R., 163 Miss. 354, 142 So. 11 (1932) (consolidation of multiple suits for damages claiming that railroad's filled trestles were causing drainage damages); Yazoo & M.V.R.R. v. McConnell, 127 Miss. 581, 90 So. 321 (1922) (consolidation of multiple suits for damages claiming that railroad culverts were causing improper drainage). Logically, it seems that the community of interest requirement would be something more than what is required for the consolidation of suits in equity as discussed at GRIFFITH, *supra* note 156, § 139, but there are cases which appear to cast doubt upon this logical conclusion. *See, e.g.*, Hightower v. Mobile, J. & K.C.R.R., 83 Miss. 708, 36 So. 82 (1904) (suit by 57 persons on notes procured from each banker by same fraudulent misrepresentations).

[175] *See, e.g.*, Tribette v. Illinois Cent. R.R., 70 Miss. 182, 12 So. 32 (1892).

[176] For a criticism of the overbreadth of the position of both Pomeroy and *Tribette*, see Z. Chafee, *supra* note 13.

[177] These exceptions are classified into similar groups and discussed in Kimbrough, *supra* note 156, at 151-52. But that author does not countenance them as exceptions, but rather as cases upholding the *Tribette* doctrine through factual distinctions.

The first case specifically excepting situations of continuing injury from the rule of *Tribette* was *Cumberland Telephone & Telegraph Co. v. Williamson.*[178] The rationale of the exception is that the continuing nature of the injury suffered by the several parties provides the community of interest required to bring the several suits into equity and there to consolidate them. The court in *Cumberland* stated:

> Such strict community of interest in the subject-matter in these cases . . . is not required, and they must be taken as stating a qualification to the general rule that a community of interest in the subject-matter is necessary or harmonized therewith by considering the continuing nature of the injury as against them all constitutes such community of interest.[179]

The exception is further justified by the fact that courts of law cannot bring the litigation to an end, "but [leave] the defendant to be vexed and harassed by continued litigation."[180] This exception has received much use where there has been a continuing injury, several suits filed at law against a defendant, and the possibility that such suits could be filed again in the future by the same plaintiffs.[181] The effect is to force

---

As long as the insurance exception lasted, insurance companies, pleading in equity, asked that cases at law be joined. *See, e.g.*, Tisdale v. Insurance Co. of North America, 84 Miss. 709, 36 So. 568 (1904). This line of exceptions was overruled in Scottish Union & Nat'l Ins. Co. v. Warren-Gee Lumber Co., 103 Miss. 816, 60 So. 1010 (1913). *See also* McCLINTOCK, *supra* note 166, § 179; 1 POMEROY, *supra* note 13, §§ 261, 261a, 261s.

[178] 101 Miss. 1, 57 So. 559 (1912).

[179] *Id.* at 9-10, 57 So. at 561, *quoting* Vandalia Coal Co. v. Lawson, 43 Ind. App. 226, 87 N.E. 47 (1909).

[180] Kimbrough, *supra* note 156, at 151. The exception might also be justified by the fact that each of the injured parties *could* have brought the original suit in equity because of the continuing nature of the injury. *See* note 169 and accompanying text *supra*.

[181] Henry v. Mobile & O.R.R., 163 Miss. 354, 142 So. 11 (1932) (consolidation of multiple suits claiming that railroad's filled trestles were causing drainage damages); Yazoo & M.V.R.R. v. McConnell, 127 Miss. 581, 90 So. 321 (1922) (consolidation of multiple suits claiming that railroad's culverts were causing improper drainage); Guice v. Illinois Cent. R.R., 111 Miss. 36, 71 So. 259 (1916) (consolidation of several suits by Guice claiming that three railroads were improperly giving notice of the arrival and departure of their trains); Illinois Cent. R.R. v. Garrison, 81 Miss. 257, 32 So. 996 (1902) (suit by several parties claiming that track was improperly laid). The latter case is particularly interesting because the court cited both *Tribette* and Pomeroy as direct authorities. Also, the court, rather than finding a community of interest among the several parties claiming injury, noted the "common right" asserted by the railroad against each party. *But see* Mississippi Power Co. v. Ballard, 166 Miss. 631, 146 So. 874 (1933), *noted in* 6 MISS. L.J. 434 (1934) (refusal to consolidate several actions against the power company claiming damages resulting from continuous, disturbing noises caused by the company's transformer substation). The court recognized the exception for continuous injury but said the exception did not apply here because the property owners had not brought successive actions. The court, however, seemed to imply, without so holding, that future actions by the property owners might be met with a successful plea of res judicata.

the injured party to claim all his damages in one suit rather than filing again for future damages. It appears that this exception would be available to enable a group to bring a class action in equity where the requisite continuing injury is present.

The second well-established exception occurs where the interests of the multiple parties derive from a common source. The Mississippi Supreme Court has stated that parties may be joined in equity in one suit where "the interest and liability of the defendants, though separate, flow from the same fountain, or radiate from the same center, or have a common connecting link."[182] This exception also has been used primarily by defendants to consolidate in equity several suits brought against them in actions at law.[183] The language of this exception is susceptible to broad interpretation; it appears that it would allow many actions that merely have a community of interest in questions of law and fact. The cases indicate that with proper pleading, this could be a productive area for the growth of a more indulgent policy toward class actions.

Another exception has been argued unsuccessfully. Some have urged that the chancery court may retain consolidated suits otherwise cognizable at law and hear them to their completion where the chancery court has accepted the suits by mistake of jurisdiction. This argument is based upon section 147 of the Mississippi Constitution.[184] The court

---

[182] Roberts v. Burwell, 117 Miss. 451, 469, 78 So. 357, 359 (1918).

[183] Letts v. Hancock Bank, 195 Miss. 519, 15 So. 2d 422 (1943) (suit by several parties against bank to recover amount wrongfully paid by bank on lands in estate to which the several parties had rights); Hart v. Moore, 171 Miss. 838, 158 So. 490 (1935) (suit against several parties based on realty transaction); Tchula Commercial Co. v. Jackson, 147 Miss. 296, 111 So. 874 (1927) (suit against several parties based upon realty-loan transaction); Johnson v. Staple Cotton Co-op., 142 Miss. 312, 107 So. 2 (1926) (consolidation of several suits growing out of destruction of cotton by fire while held by Co-op); Middleton v. Howell, 127 Miss. 880, 90 So. 725 (1922) (boundary dispute between grantors and grantees of property); Robertson v. Monroe County, 118 Miss. 541, 79 So. 187 (1918) (suit by revenue agent against county on behalf of several towns within county to regain funds collected by county); Roberts v. Burwell, 117 Miss. 451, 78 So. 357 (1918) (suit against several lessees where land had passed to present owners by will from complainant's spouse and complainant had retained a right to rents); Hightower v. Mobile, J. & K.C.R.R., 83 Miss. 708, 36 So. 82 (1904) (suit by 57 persons on notes procured from each person by the same fraudulent misrepresentations).

Some of these cases, especially *Hightower* and *Staple Cotton Co-op.*, are difficult to see as being at all consistent with *Tribette* although they may cite it as authority. Rather than mere exceptions to the harshness of *Tribette*, they seem to be outright desertions into the camp of Pomeroy. It has been argued, however, that *Hightower* is not inconsistent with *Tribette* because the allegations of the bill and the relief prayed for "gave an equitable right to the makers of the notes and clothed the equity courts with jurisdiction to hear and determine the case." Kimbrough, *supra* note 156, at 148.

[184] MISS. CONST. art. 6, § 147 states:

> No judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said

long ago disapproved this contention,[185] stating:

> No question as to mistake of jurisdiction between courts of law and chancery, within the contemplation of section 147 of our constitution, arises in this case, for, if we had only one forum armed with full power to administer all remedial justice, joinder of all these parties in one action would not be admissible.[186]

Although Mississippi has no class action statute, both case law and statutes[187] authorize suits by citizens, as taxpayers, on behalf of others against official action by governmental units. There have been successful suits, for instance, enjoining the wrongful removal of a county seat;[188] recovering expenditures already made;[189] claiming wrongful action by county, state, or city;[190] enjoining the issuance of bonds;[191] and enjoining the creation of a separate judicial district.[192] There is also statutory authority for stockholder derivative suits.[193]

D. Recent Mississippi Class Actions

While most of the rest of the nation has gradually moved toward

---

judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction . . . .

[185] Henry v. Donovan, 148 Miss. 278, 114 So. 482 (1927); Newton Oil & Mfg. Co. v. Sessum, 102 Miss. 181, 59 So. 9 (1912); Tribette v. Illinois Cent. R.R., 70 Miss. 192, 12 So. 32 (1892); GRIFFITH, *supra* note 156, § 517; Kimbrough, *supra* note 156, at 160-61.

[186] Tribette v. Illinois Cent. R.R., 70 Miss. 182, 192, 12 So. 32, 34 (1892).

[187] MISS. CODE ANN. § 19-13-37 (1972) provides:

> If a board of supervisors shall appropriate any money to an object not authorized by law, the members of the board who did not vote against the appropriation shall be liable personally for such sum of money, to be recovered by suit in the name of the county, or in the name of any person who is a taxpayer suing for the use of the county, and such taxpayer shall be liable for costs in such case.

MISS. CODE ANN. § 19-3-5 (1972) provides: "[A]ny taxpayer of the county may sue on [the county supervisor's] bond . . . ."

[188] Hinton v. Board of Supervisors, 84 Miss. 536, 36 So. 565 (1904); Board of Supervisors v. Buckley, 81 Miss. 474, 33 So. 650 (1903).

[189] Brown v. Reeves, 129 Miss. 755, 92 So. 825 (1922).

[190] Golding v. Armstrong, 231 Miss. 889, 97 So. 2d 379 (1957); Mississippi Road Supply v. Hester, 185 Miss. 839, 188 So. 281 (1939); Jones v. Mayor, 104 Miss. 449, 61 So. 456 (1913); Belzoni Drainage Comm'n v. Winn, 98 Miss. 359, 53 So. 778 (1910).

[191] Clarksdale v. Broaddus, 77 Miss. 667, 28 So. 954 (1900).

[192] Carter v. Harrison County Election Comm'n, 183 So. 2d 630 (Miss. 1966).

[193] MISS. CODE ANN. § 79-3-93 (1972) provides:

> No action shall be brought in this state by a shareholder in the right of a domestic or foreign corporation unless the plaintiff was a holder of shares or of voting trust certificates therefor at the time of the transaction of which he complains, or his shares or voting trust certificates thereafter devolved upon him by operation of law from a person who was a holder at such time.

various versions of the liberal doctrine of class suits,[194] Mississippi refuses. Although the courts of this state vacillated shortly after *Tribette*, once again completely accepting the Pomeroy position,[195] that deviation was soon expressly reversed.[196] Mississippi has since clung to the narrow view and indulges as exceptions only those few situations which have successfully been distinguished from the *Tribette* doctrine.[197]

A recently attempted multiparty suit is *Barrett v. Coullet*.[198] There, the named plaintiff had purchased a ticket to watch the televising of a prizefight. The reception and projection of the broadcast were so poor that the ticket purchaser brought suit in the chancery court against the promoter of the event on behalf of himself and all other persons who had attended. The chancery court dismissed the complainant's bill and he appealed; the supreme court affirmed.[199] Discussing other rationales in reaching its decision, the court refused the class action on two principal grounds: there was no "ascertainable class,"[200] and there was no "community of interest" among that class.[201] The court stated that the nonappearing members of the class would be deprived of their "day in court."[202] Further, the court noted that there were administrative diffi-

---

[194] *See* the discussion of the various present state class-action statutes at part IV *infra*. The evolution of the present federal law is discussed in parts I & II *supra*.

[195] *See* Whitlock v. Yazoo & M.V.R.R., 91 Miss. 779, 45 So. 861 (1908); Blumer v. Ulmer, 90 Miss. 893, 44 So. 161 (1907); Thames v. Mangum, 87 Miss. 575, 40 So. 327 (1906). For a discussion of Mississippi's vacillation and the "checkered course" of the *Tribette* case, see POMEROY, *supra* note 13, § 264, at 579 n.20.

[196] Cumberland Tel. & Tel. Co. v. Williamson, 101 Miss. 1, 57 So. 559 (1912).

[197] *See* notes 175 through 183 and accompanying text *supra*.

[198] 263 So. 2d 764 (Miss. 1972), *noted in* 44 MISS. L.J. 315 (1973).

[199] 263 So. 2d at 764-65. It is interesting to note that the complainant, in drafting the complaint, tracked the language of FED. R. CIV. P. 23(a). *See* 263 So. 2d at 765.

[200] 263 So. 2d at 766-67. Although this phrase has a clear enough meaning in the context of this case; *i.e.*, the parties to be represented by the complainant could not be discovered, the objection to unascertainable parties appears to be strongly limited by Mississippi's "numerous parties rule." *See* GRIFFITH, *supra* note 156, § 144. In Floreen v. Saucier, 200 Miss. 428, 27 So. 2d 557 (1946), this rule was used to allow a suit against a defendant as trustee for the descendants of one of his ancestors. The descendants numbered approximately 1,500 persons and admittedly could not be "ascertained."

[201] 263 So. 2d at 765-67. This combination of prerequisites was taken by the court from the discussion of class actions at 59 AM. JUR. *Parties* § 59 (1971). That encyclopedia cites as support for the language cases from California, the state that originated this particular phraseology. *See, e.g.*, Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967). Ironically enough, the Mississippi Supreme Court has adopted the phraseology of a state that is by far the leader in allowing the use of the class action device, especially in the situations of consumer class litigation. *See* notes 248 through 253 and accompanying text *infra*.

[202] 263 So. 2d at 765-67. That is, as the *Tribette* court cautioned, the nonappearing members would lose their right to have each of their cases determined by a separate hearing at law. In a rather general summation of this point, the court stated, "It just goes

culties involved in distributing damages, and that the complainant, although asking relief in equity, had based his complaint on breach of contract and breach of implied warranty, actions at law.[203] Although the court did not draw as heavily from *Tribette* as it could have in order to decide the case succinctly, the decision generally is congruent with *Tribette* and may be taken as a continuation of that doctrine.

In the more recent case of *Evans v. Progressive Casualty Insurance Co.*,[204] the complainant sought money damages for himself and all other Mississippi policyholders of defendant companies. The bill charged that the defendant companies, in writing and underwriting substandard automobile insurance policies, had conspired among themselves and their agents to charge interest in excess of 20 percent, thus violating the Mississippi usury statute.[205] The court began by stating that the present case involved separate transactions. This inevitably brings into question different factual situations and thus precludes a finding of the requisite common interest in the law and facts among the members of the class. Speaking further of the many contracts involved, the difficulty of having a separate "mini-trial" for each member of the class in order that he may recover his separate damages was discussed. The court could not comprehend how "any court armed with all the ingenuity of man, could cope with the complexities and difficulties as would result from a class action if allowed here."[206] Relying on the *Tribette* rule and the three

---

against the grain of 'due process' and 'equal protection of the law.' " *Id.* As a general proposition concerning class actions, this statement is incompatible with Hansberry v. Lee, 311 U.S. 32 (1940). There it is stated:

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process . . . .
>
> To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative" suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.

Id. at 40-41.

It is also inconsistent with what the great majority of other states are doing. *See* part IV *infra*.

[203] 263 So. 2d at 766.

[204] 300 So. 2d 149 (Miss. 1974).

[205] MISS. CODE ANN. § 75-17-1 (1972).

[206] 300 So. 2d at 153. There are other courts that do not feel so limited. *See, e.g.*, Vasquez v. Superior Ct., 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971); Rodriquez v. Credit Sys. Specialists, Inc., 17 Ill. App. 3d 606, 308 N.E.2d 342 (1974); Rathbun v. W.T. Grant Co., 219 N.W.2d 641 (Minn. 1974); Miles v. N.J. Motors, 32 Ohio App. 2d 350, 291 N.E.2d 758 (1972).

Of special interest is Schneider v. Wilmington Trust Co., 310 A.2d 897 (Del. Ch. Ct. 1973). The Delaware Chancery Court examined and expressly refused to follow the *Tribette* doctrine, allowing multiple suits on the charge of usurious interest.

prerequisites previously set out in *Barrett v. Coullet*,[207] the court stated that the class action could not succeed because the complainant class had no independent grounds in equity. In terms hard and broad enough to give despair to anyone hoping to gain relief through the device of a class action, the court refused to consider the Federal Rules of Civil Procedure or similar state statutes in other jurisdictions, and referred to the prospects of "legalized blackmail," "buckling under" of defendants, and "windfalls" to plaintiffs if the court should become lenient toward class actions. Finally, the court once again noted that class actions run against the grain of due process and equal protection of the law.[208]

The latest class action in Mississippi, *Liddell v. Litton Systems Inc.*,[209] was handled much more summarily. The complainant charged that the company's credit union had exacted a rate of interest in contravention of the usury laws of Mississippi. The bill sought to collect for the complainant and all other persons similarly situated the statutory penalty for usury, forfeiture of principal and interest. By analogy to authorities not allowing the assignment of the right to such penalties,[210] the court held that such penalty provisions should be strictly construed and that the right to the statutory penalty could not be invoked by a stranger on behalf of a borrower who had no knowledge of the impending litigation and who might not appreciate the acts of his would-be benefactor. The court noted that if this class action were allowed the result might be millions of dollars of loss to the defendants. In closing, the court again warned of the managerial problems of the class action.

E. Class Actions in Mississippi—A Summary

Mississippi has retained its narrow approach to multiparty suits. While most other states have recognized the class action device as a helpful and even necessary procedural tool, this state has not yet adequately dealt with the compelling rationale of the class action. Where an individual has few resources or will gain only a small amount from litigation, he is effectively without a remedy unless the remedy may be sought by group effort. One result of denying group remedy is a weakening effect on efforts to control business malpractice. As long as the malpractice is perpetrated on a large group at a small amount per individual or perpetrated on a group with limited economic resources, there can be no recovery from the perpetrator. Indeed, there are considerable

---

[207] 263 So. 2d 764 (Miss. 1972).

[208] See note 202 *supra*.

[209] 300 So. 2d 455 (Miss. 1974).

[210] Fry v. Layton, 191 Miss. 17, 2 So. 2d 561 (1941); 91 C.J.S. *Usury* § 151 (1955).

gains for the perpetrator, ill-gotten though they may be. If the reason for the existence of equity courts is the lack of an adequate remedy at law, then this situation demands intervention. The federal courts appear to be relegating the class action litigation to the state courts;[211] if there is no remedy in the state courts, there is no remedy at all.

The *Liddell* and *Evans* cases may have been correctly decided; the potential loss to the defendants accused of exacting usurious rates was in great disproportion to their alleged misdeeds. A class suit for the interest charged or at least for the usurious increment, however, would seem appropriate.

The narrow allowance of multiparty suits in the past was apropos to a different situation and rationale. Generally, there was an attempt by a powerful corporation to bring individual suits from circuit court jury trials, aggregate them, and have them heard as a group before a chancellor. In the contemporary class action, however, the class has not attempted to bring individual suits, and often would not be able to do so. Further, in addition to efficiency, there is a public need for contemporary class actions; the old multiparty suit, however, was primarily for convenience. Although class actions have grown from the same seed as the earlier multiparty actions, the narrow, archaic common-law conceptual analyses of privity are not appropriate to class actions. Generally, the analyses are applications of conceptual and formal substantive law to prevent the use of a modern functional procedural device.

Although the recent Mississippi cases are discouraging to those who would seek such a remedy, there is prior Mississippi case law upon which one apparently can rely. The exceptions to the old multiparty actions provide areas for growth of a more tolerant class action atmosphere. Absent court acceptance of the class action device, legislation is strongly recommended to provide this much-needed relief.

IV. Class Actions in State Courts: An Overview

Class actions in federal courts under Federal Rule of Civil Procedure 23(b) have, at best, an uncertain future.[212] The difficulty of executing a successful class action in that forum has made the availability of class remedies at the state level a pressing necessity. Without a state forum, many groups of individuals who cannot afford costly separate and individual suits are without a remedy. Some states have readily provided the necessary forum; a few show no inclination to do so. This section will give an outline of what state relief is available in the various jurisdictions.

---

[211] *See* part IV *infra*.

[212] *See* part II *supra*. *See also* Maraist & Sharp, *supra* note 126.

State class action practices can be divided into four categories; those based upon: (1) the common law; (2) the 1848 Field Code rule for class actions; (3) the 1938 Federal Rule 23; and (4) its 1966 successor.

A. Common Law

One author has said that "it is nearly impossible to particularize the attitude of [the common law] jurisdictions with regard to the class action or any of its features."[213] The confusing precedent and the strict adherence to abstract legal theory in the face of pressing contemporary needs are probably more predominant in these jurisdictions than in others.[214] The preceding discussion of the Mississippi common law class action practice,[215] or lack of it, portrays the problems of the four states which still have no statutory provisions for class actions. The principal common concern of these state courts is whether there is a proper jural relation (often referred to as privity or community of interest) among the individuals of the class.[216]

In addition to Mississippi, the common law states are New Hampshire, Virginia, and Illinois. It has been said that some of these states have failed to develop statutory class action provisions because they have retained common law pleading and practice or because they have had no fusion of law and equity procedure in their courts.[217] This reasoning does not reach Illinois, however, and it is disconcerting that one of the most procedurally developed states has failed to establish statutory guidelines for class actions.[218]

The case law on class actions in Virginia is sparse, and no outline of that state's receptiveness or hostility to contemporary class action techniques can be discerned.[219] Conversely, Illinois has a considerable amount of case law on the subject. The courts there have been concerned with, among other things, the constantly recurring theme of community

---

[213] Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B.U.L. REV. 407, 428 (1969).

[214] *Id.* at 425-33.

[215] See part III *supra*.

[216] *See* Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609 (1971); Starrs, *supra* note 213; notes 155 through 211 and accompanying text *supra*.

[217] Starrs, *supra* note 213, at 425. Mississippi has retained common law pleading and practice. New Hampshire and Virginia have not fused their law and equity procedure. *Id.*

[218] *Id.* at 425-28; *see* Tornquist, *Roadmap to Illinois Class Actions*, 5 LOYOLA (CHI.) L.J. 45 (1974); Comment, *Illinois: A Common Law Approach*, 68 NW. U.L. REV. 1094 (1974).

[219] Starrs, *supra* note 213, at 428; *see* Howell, *Two Proposals for Change in Virginia Law—A Class Action Procedure and a Consumer Fraud Law*, 8 U. RICHMOND L. REV. 1 (1973).

of interest.[220] There has been a warming trend toward class actions, however, and the present attitude in Illinois cannot be described as altogether unreceptive.[221] Illinois has also shown concern with the closely related due process problems of adequacy of representation and conflicting interests among the members of the class.[222]

Although New Hampshire has little case law on the subject, those cases demonstrate that there is great variation existing among states that practice the common law approach. Unlike other common law states, New Hampshire has long given support to the argument that the denial of a class suit to the economically less advantaged who individually stand to gain but a small sum is a practical denial of justice.[223] There is evident in New Hampshire a concern for the "avoidance of the economic infeasibility of multiple actions."[224]

B. The Field Code

This rather general provision had its origin in New York's Field Code of 1848.[225] The provision is still included in the statutes of that state and reads in part:

---

[220] *See, e.g.*, Newberry Library v. Board of Educ., 387 Ill. 85, 55 N.E.2d 147 (1944). The court approached this problem with a primary concern for adequacy of representation. *See also* Starrs, *supra* note 213, at 428-32.

[221] Starrs, *supra* note 213, at 428-32. *Compare* Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 167 N.E.2d 230 (1960), *and* Harrison Sheet Metal Co. v. Lyons, 15 Ill. 2d 532, 155 N.E. 2d 595 (1959), *with* Newberry Library v. Board of Educ., 387 Ill. 85, 55 N.E. 2d 147 (1944). Further evidence of Illinois' mellowing attitude toward class actions can be seen in Gaffney v. Shell Oil Co., 19 Ill. App. 3d 987, 312 N.E.2d 753 (1974), and Rodriguez v. Credit Sys. Specialists, Inc., 17 Ill. App. 3d 606, 308 N.E.2d 342 (1974). The *Gaffney* case is interesting in that it is a "double class action" (a class of gasoline purchasers against a class of service station operators) and because, although the Illinois court dismissed all but the named defendant, the opinion encourages such class action where there is a proper representative. The court also pointed out the irrelevance of the fact that many different transactions were involved. Illinois has found community of interest through rather liberal usage of the common fund approach. Starrs, *supra* note 213, at 431; *see, e.g.*, Kruse v. Streamwood Util. Corp., 34 Ill. App. 2d 100, 180 N.E.2d 731 (1962) (payments made to defendant water utility based on its misrepresentation declared a common fund). The common fund approach appears to give some greater feeling of propriety to the court because the action can be thought of as in rem rather than in personam with all its problems of notice and res judicata effects; *see* Comment, *Expanding the Impact of State Court Class Action Adjudications to Provide an Effective Forum for Consumers*, 18 U.C.L.A.L. Rev. 1002 (1971).

[222] *See, e.g.*, Rodriquez v. Credit Sys. Specialists, Inc., 17 Ill. App. 3d 606, 308 N.E.2d 342 (1974); State Life Ins. v. Board of Ed., 394 Ill. 301, 68 N.E.2d 525 (1946); Newberry Library v. Board of Ed., 387 Ill. 85, 55 N.E.2d 147 (1944); Comment, *supra* note 218.

[223] Starrs, *supra* note 213, at 433. *See* Textile Workers Union v. Textron, Inc., 99 N.H. 385, 111 A.2d 823 (1955).

[224] Starrs, *supra* note 213, at 433.

[225] Homburger, *supra* note 216, at 612-13.

> And when the question is one of a common or general interest of many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.[226]

The statute has proved popular, and, whether through lethargy or genuine satisfaction with the statute, 14 states have retained it in either its original or some variated form.[227]

The first problem with the provision arises from its wording. It is not clear whether the "or" following the first conditional phrase is conjunctive or disjunctive. Thus, it is not clear whether, in order to bring a class action, one must have both a question of common or general interest and numerous parties raising an impracticability, or if one only need meet one of the two conditions.[228] If the disjunctive is meant, then a common interest requirement appears unnecessary and the most independent-issue-laden consumer class action could be brought under this statute.[229] Of course, this is not the way the courts have read the statute, and it probably is not the way the originating legislature intended it to be read. Even the state that most liberally allows class actions under this type of statute has not interpreted it in this manner.[230] Some states have solved this problem by deleting the troublesome "or" and merging the two conditional phrases, making it clear that both conditions must be met in order to initiate a class action.[231]

Another problem raised by the original code version was caused by the class action section being a part of a larger provision pertaining to

---

[226] N.Y. CIV. PRAC. LAW § 1005 (McKinney 1963).

[227] ALA. CODE tit. 7, § 128 (1960); ARK. STAT. ANN. § 27-809 (1962); CAL. CIV. PRO. CODE § 382 (West 1973); CONN. GEN. STAT. ANN. § 52-105 (1958); FLA. R. CIV. P. 1.220; ME. R. CIV. P. 23; MD. R. CIV. P. 209; NEB. REV. STAT. § 25-319 (1964); N.M. STAT. ANN. § 21-6-1 (1970); N.Y. CIV. PRAC. LAW § 1005 (McKinney 1963); OKLA. STAT. ANN. § 12-233 (1960); PA. STAT. ANN. § 2230 (1967); S.C. CODE ANN. § 10-205 (1962); WIS. STAT. ANN. § 260.12 (1957).

[228] Homburger, *Private Suits in the Public Interest in the United States of America*, 23 BUFFALO L. REV. 343, 351 (1974); Homburger, *supra* note 216, at 614; Starrs, *supra* note 213, at 437; Comment, *New York: Statutory Construction as a Means of Constriction*, 68 NW. U.L. REV. 1008, 1110 (1974); 38 ALBANY L. REV. 865, 867 (1974).

[229] *See* Starrs, *supra* note 213, at 437.

[230] *See* Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967); Weaver v. Pasadena Tournament of Roses Ass'n, 32 Cal. 2d 833, 198 P.2d 514 (1948); Starrs, *supra* note 213, at 438; 1 FORDHAM URBAN L.J. 93 (1972).

[231] *E.g.*, FLA. R. CIV. P. 1.220 states:

> When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

On some points Florida's interpretation of this statute is as narrow as Mississippi's decisional law. *Compare* Evans v. Progressive Cas. Ins. Co., 300 So. 2d 149 (Miss. 1974) *with* Federated Dep't Stores, Inc. v. Pasco, 275 So. 2d 46 (Fla. Ct. App. 1973).

the joinder of parties.[232] This gave rise to the interpretation that there could be no class action unless the individuals in the class could have been joined in the action of the representative party. This proved particularly problemsome in those jurisdictions with strict joinder requirements.[233] This difficulty has been alleviated by separation of the class action and joinder provisions in the statutory system.[234]

This provision provides no guidelines aside from the two conditions discussed above. This allows a diversity of approaches as wide as under the common law and sets up no allowances for management of the class action by the court. Further, there are no guides as to what the res judicata effect of a judgment under the class action will be and whether the effect may vary in certain situations.[235]

The great variance of attitudes toward class actions that can exist under this provision is demonstrated by the practices under the California and New York statutes.[236] New York has been one of the stricter states, disallowing class actions except under the most demanding conditions.[237] California, on the other hand, is undoubtedly the leader in allowing class actions, particularly consumer class actions, even where based on fraud.[238]

New York will not recognize a class action for separate and distinct relief to members of the class if there is no limited fund or a substantive jural relation between the members of the class, despite a common issue of law and fact.[239] In *Hall v. Coburn Corp. of America*,[240] there were identical violations of a provision of the New York Retail Installment Sales Act.[241] The same significant parts of the contracts of each member

---

[232] Homburger, *supra* note 216, at 615; Starrs, *supra* note 213, at 434-36.

[233] Homburger, *supra* note 216, at 615.

[234] *Id.*; Starrs, *supra* note 213, at 434-36; *see, e.g.*, N.Y. Civ. Prac. Law § 1005 (McKinney 1963).

[235] *See generally* Homburger, *supra* note 216, at 612-29; Starrs, *supra* note 213, at 433-63. Compare this with Fed. R. Civ. P. 23 and Fed. R. Civ. P. 23, 308 U.S. 689, 689-90 (1939), both of which have more detailed guidance.

[236] Cal. Civ. Pro. Code § 382 (West 1973); N.Y. Civ. Prac. Law § 1005 (McKinney 1963).

[237] *See* notes 239 through 247 and accompanying text *infra*.

[238] *See* notes 248 through 253 and accompanying text *infra*.

[239] *See* cases discussed note 243 *infra*; Eckhardt, *Consumer Class Actions*, 45 Notre Dame Law. 663 (1970); Homburger, *supra* note 228, at 353; Homburger, *supra* note 216, at 617-21; Kirkpatrick, *Consumer Class Litigation*, 50 Ore. L. Rev. 21, 29 (1970); Starrs, *supra* note 213, at 455-58; Note, 39 Fordham L. Rev. 765 (1971); Comment, *supra* note 228. *But see* Richards v. Kaskel, 69 Misc. 2d 435, 330 N.Y.S.2d 582 (Sup. Ct. 1972), *modified*, 40 App. Div. 2d 804, 338 N.Y.S.2d 279 (1972), *rev'd*, 32 N.Y.2d 524, 300 N.E.2d 388, 347 N.Y.S.2d 1 (1973), *noted in* 38 Albany L. Rev. 865 (1974) (class action available to tenants seeking declaratory judgment as to applicability of statute which would allow denial of their lease renewals).

[240] 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970).

[241] N.Y. Pers. Prop. Law § 413 (McKinney Supp. 1974).

of the suing class were printed in illegally small type. The court noted that the transactions basically were separate with no significant jural relation between the members of the class.[242] It thus appears that there has been no recent demise of privity in New York.[243] This case is congruent with the earlier New York case of *Society Milion Athena, Inc. v. National Bank of Greece*,[244] wherein a class action was similarly denied and it was stated: "Separate wrongs to separate persons, though committed by similar means and even pursuant to a single plan, do not alone create a common or general interest in those who are wronged."[245] There is some hope of better prospects for class actions in New York. In one recent case, although denying a class action, the court recognized that the restrictive interpretation of the New York class action "no longer has the viability it may once have had."[246] The court even called for legislation to relieve restrictions on class actions "which in many instances may mean a total lack of remedy, as a practical matter, for wrongs demanding correction."[247]

New York is contrasted with California. In *Daar v. Yellow Cab Co.*,[248] the California Supreme Court allowed a class action suit by taxicab patrons, both cash and ticket customers, to regain taxi fares based on rigged meters. Stating that to support a class action there must be an ascertainable class and a question of common interest to the class,[249] the court then equated the two conditions and apparently eliminated a

---

[242] 259 N.E.2d at 721, 311 N.Y.S.2d at 282-83. The court also noted that there would be no significant public benefit served by allowing the suit. *Id.* at 722, 311 N.Y.S.2d at 285.

[243] *See* Zachary v. R.H. Macy & Co., 66 Misc. 2d 974, 323 N.Y.S.2d 757 (Sup. Ct. 1971), *rev'd*, 39 App. Div. 2d 116, 332 N.Y.S.2d 425, *rev'd*, 31 N.Y.2d 443, 293 N.E.2d 80, 340 N.Y.S.2d 908 (1972) (separate contracts). *But see* Richard v. Kaskel, 69 Misc. 2d 435, 330 N.Y.S.2d 582 (Sup. Ct.), *modified*, 40 App. Div. 2d 804, 338 N.Y.S.2d 279 (1972), *rev'd*, 32 N.Y.2d 524, 300 N.E.2d 388, 347 N.Y.S.2d 1 (1973). *See generally* Hall v. Coburn Corp., 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970); Homburger, *supra* note 216, at 617-21. One reason many states with the Field Code class action rule cling to privity may be that the rule fails to supply criteria for identifying proper class action situations and does not provide guidelines for management. *See* Homburger, *supra* note 228, at 354.

[244] 281 N.Y. 282, 22 N.E.2d 374 (1939).

[245] *Id.* at 292, 22 N.E.2d at 377.

[246] Moore v. Metropolitan Life Ins., 33 N.Y.2d 304, 313, 307 N.E.2d 554, 558, 352 N.Y.S.2d 433, 439 (1973).

[247] *Id.* Further hope is found in other recent cases. *See* Richards v. Kaskel, 69 Misc. 2d 435, 330 N.Y.S.2d 582 (Sup. Ct.), *modified*, 40 App. Div. 2d 804, 338 N.Y.S.2d 279 (1972), *rev'd*, 32 N.Y.2d 524, 300 N.E.2d 388, 347 N.Y.S.2d 1 (1973); Young v. Shuart, 67 Misc. 2d 689, 325 N.Y.S.2d 113 (Sup. Ct. 1971).

[248] 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

[249] 433 P.2d at 739, 63 Cal. Rptr. at 731. Mississippi has adopted this same language. *See* notes 200 & 201 and accompanying text *supra*.

definable class as an independent prerequisite to a class action.[250] The court stated that the fact that each plaintiff would eventually have to prove his separate claim for a portion of any class recovery was only a factor to consider in determining the propriety of a class action. This factor is to be balanced against the benefits of such an action to the litigants and to the courts. Further, it is not necessary that a common fund exist. The court recognized several factors as "substantial benefits," the presence of which weigh heavily in favor of a single determination of the central issue rather than dismissal of the class action. The following were the benefits present in this case: The principal issues to be litigated in a class action were the same issues which would be raised in any individual actions by members of the class; a multiplicity of suits might be avoided; and the small amount of damages claimed by each class member would make individual recovery unfeasible and unlikely.

In a later California case, the court went further. It allowed a class action recovery by a group of consumers based on individual transactions involving fraudulent representations. In *Vasquez v. Superior Court*,[251] 37 individual consumers brought a class action against a sales company and its finance company which had made door-to-door sales of combination freezer-food plans. With the purchase of a freezer the consumer was to receive a 7-month supply of frozen food. The company defaulted after assigning the installment contracts. There was no problem finding the ascertainable class, and the court found that the common set of facts—oral misrepresentations individually and separately communicated to each member of the class—provided the necessary common interest. The court stated that the "mere fact" that the transactions were separately consummated was "not determinative so long as each member will not be required to establish his individual right to recover."[252]

Thus, under the same statutory provision as New York, the California courts continually have improved and modernized their approach to and administration of class actions, remaining unstymied by the

---

[250] *See* 433 P.2d at 739-48, 63 Cal. Rptr. at 731-40; Kirkpatrick, *supra* note 239, at 25.

[251] 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971); Annot., 53 A.L.R.3d 513 (1973).

[252] 484 P.2d at 969, 94 Cal. Rptr. at 801. The court had this to say about the separate transactions involved:

> The mere fact that separate transactions are involved does not of itself preclude a finding of the requisite community of interest so long as every member of the alleged class would not be required to litigate numerous and substantial questions to determine his individual right to recover subsequent to the rendering of any class judgment which determined in plaintiff's favor whatever questions were common to the class.

Id.

common law rigidity of such considerations as "community of interest."[253]

C. *The 1938 Federal Rule 23*

The 1938 Federal Rule has been retained by a number of states despite the total revision of the class action provision in the 1966 Federal Rules of Civil Procedure.[254] The rule separated permissible class actions into three categories based upon the jural relations of the parties in the class.[255] Where the right to be adjudicated was joint, the action was known as a "true" class action; where the right was several and concerned specific property, "hybrid"; and where the right was several with only a common question of law and fact affecting the rights, "spurious."[256] The purpose of the rule was to give meaning to the terminology

---

[253] There are other recent cases in which the California courts have found class actions suitable in situations which other courts might have turned down because of the separate transactions, warranties, or contracts. *See* Collins v. Rocha, 7 Cal. 3d 232, 497 P.2d 225, 102 Cal. Rptr. 1 (1972); LaSala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971); Budget Fin. Plan v. Superior Court, 34 Cal. App. 3d 794, 110 Cal. Rptr. 302 (Ct. App. 1973); Anthony v. General Motors Corp., 33 Cal. App. 3d 699, 109 Cal. Rptr. 254 (Ct. App. 1973). Further discussion of the California class action progression can be found at Baranoff, Lobell, Louisell, Miller, Warren & West, *Comments on Vasquez v. Superior Court*, 18 U.C.L.A.L. REV. 1041 (1971); Homburger, *supra* note 216, at 624-25; Kirkpatrick, *supra* note 239; Mainland, *Class Actions in California: A First Look at Vasquez v. Superior Court*, 47 L.A.B. ASS'N BULL. 13 (1971); Starrs, *supra* note 213, at 447-49; Comment, *California: A Flexible Scheme*, 68 NW. U.L. REV. 1024 (1974); Comment, *supra* note 221; 1 FORDHAM URBAN L.J. 93 (1972).

[254] ALA. CODE tit. 7, EQUITY R. 31 (1960); ALASKA R. CIV. P. 23; GA. CODE ANN. § 81A-123 (1972); IDAHO R. CIV. P. 23; IOWA R. CIV. P. 42; LA. CODE CIV. PRO. ANN. art. 591-92 (1960); MICH. GEN. CT. R. 208; N.J. CIV. PRAC. R. 4:36-1; N.M. STAT. ANN. § 21-1-1(23) (1970); N.C. GEN. STAT. § 1A-1 R. 23 (1969); R.I.R. CIV. P. 23; TEX. R. CIV. P. 42; W. VA. R. CIV. P. 23 (1973).

[255] Fed. R. Civ. P. 23(a), 308 U.S. 689 (1939), provides:

> (a) If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> (2) several, and the object of the action is the adjudication of claims which do or may affect the specific property involved in the action; or
>
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

See 2 BARRON & HOLTZOFF, *supra* note 89, § 561, at 260-61; 3B J. MOORE, *supra* note 9, ¶ 23.01[8].

[256] 2 BARRON & HOLTZOFF, *supra* note 89, § 561;3B J. MOORE, *supra* note 9, ¶ 23.01; 7 WRIGHT & MILLER, *supra* note 46, § 1752, at 512. *See* note 255 *supra*.

of "common or general interest" as used in the Field Code version of the class action rule.[257] The revision also made class actions available to both legal and equitable remedies.[258]

The spurious category was meant especially to facilitate class actions where there were only common questions of fact and law.[259] This category, however, became the most problemsome. As neat as the division of the categories seemed, it proved extremely difficult to pigeonhole the cases properly. Since most courts allowed binding judgments as to absent class members only in the first two categories,[260] the third became practically worthless. One may as well bring the action in his individual capacity if the judgment is to be binding on only the parties actually before the court. The weakness of this category was alleviated somewhat by two developments. "One way" intervention allowed a party to intervene in the suit at a late point, even after there had been a favorable judgment.[261] Thus, although by a rather awkward method, the judgment was effectively binding on more parties than just those originally before the court. The other development was the use of protective orders by some states to facilitate court management of the class action and to satisfy some due process problems by allowing the court considerable discretion in dealing with problems such as notice.[262]

The 1938 Federal Rule proved unwieldy because of its highly conceptual categories.[263] Some states lessened the problem by modifying the provision, perhaps adding new categories or deleting old ones.[264] Little would be gained by a close examination of the various states' attempts to deal with the troublesome categories.[265] Most of the development in

---

[257] Starrs, *supra* note 213, at 463.

[258] 7 WRIGHT & MILLER, *supra* note 46, § 1752.

[259] *See* note 255 *supra*.

[260] 2 BARRON & HOLTZOFF, *supra* note 89, § 572, at 347; 3B J. MOORE, *supra* note 9, ¶ 23.01[11.-3]; 7 WRIGHT & MILLER, *supra* note 46, § 1752, at 526. The problem over the binding effect of the rule could have been alleviated had it been provided for in the rule as it was in the 1966 Federal Rule. *Id.* § 1751.

[261] 2 BARRON & HOLTZOFF, *supra* note 89, § 572; 3B J. MOORE, *supra* note 9, ¶ 23.01[11.-3]; Homburger, *supra* note 216, at 629; Starrs, *supra* note 213, at 467-68.

[262] Starrs, *supra* note 213, at 468-69. *See, e.g.*, IDAHO R. CIV. P. 23(d); MICH. GEN. CT. R. 208(4); R.I.R. CIV. P. 23(d).

[263] *See* 2 BARRON & HOLTZOFF, *supra* note 89, §§ 561-72; 7 WRIGHT & MILLER, *supra* note 46 §§ 1751-52.

[264] Alabama adds a fourth category to provide for the adjudication of executory interests. ALA. CODE tit. 7, EQUITY R. 31 (1960). Georgia utilizes only the "true" and "hybrid" categories. GA. CODE ANN. § 81A-123 (1972). Louisiana solves the category problem by providing only one category, the true category. LA. CODE CIV. PRO. ANN. arts. 591-92 (1960). Alabama and New Mexico have the Field Code version and the 1938 Federal Rule version. ALA. CODE tit. 7, § 128 & EQUITY R. 31 (1960); N.M. STAT. ANN. §§ 21-1-1 (23), -6-1 (1970).

[265] For a lengthy commentary on state practice under this variant of the rule, see Starrs, *supra* note 213, at 470-91.

class actions has occurred in the states that have retained either the Field Code variant or the version based on the new 1966 Federal Rule 23. Many states which still have the 1938 version have been moving toward the 1966 revision.[266]

D. The 1966 Federal Rule 23

In the new federal class action rule, there is an attempt to remedy some of the specific problems posed by the old rule. The new rule has no similarity to the old one. The old categories are deleted; the effect of a judgment is made clear; the spurious class action with its uncertain results is no longer present; an attempt is made to provide for procedural fairness; an express provision for notice is included; and, perhaps most importantly, the requirement of some jural relation has been excluded.[267] Since its inception, numerous states have taken as their own class action rule some variation of this new federal approach.[268]

The new rule first states the prerequisites for a class action, requiring numerous parties, common questions of law or fact, claims or defenses typical to all parties of the class, and representative parties that will adequately protect the interests of the class.[269] Having met these prere-

---

For an example of the problems caused by the categories and one state's attempt to deal with them, see Richardson v. Kelly, 179 S.W.2d 991 (Tex. Ct. App. 1944), *aff'd*, 144 Tex. 497, 191 S.W.2d 857 (1945), *cert. denied*, 329 U.S. 798 (1947). The court in this case appears to destroy the dividing lines between the categories in an attempt to give a binding judgment. A more recent case of interest is Bush v. Upper Valley Telecable Co., 96 Idaho 83, 524 P.2d 1055 (1974). In that case the court held in an obviously spurious class action that the decision was binding unless the individuals of the class chose to "opt out" of the action—an alternative peculiar to the 1966 Federal Rule 23 version.

[266] Fifteen states had this kind of rule in 1971. Homburger, *supra* note 216, at 626. There now appear to be 13. *See* note 254 *supra*.

[267] *See* FED. R. CIV. P. 23. The new rule is based on a functional rather than conceptual approach to class actions. *See* 7 WRIGHT & MILLER, *supra* note 46, § 1753. For a discussion of the 1938 and 1966 FED. R. CIV. P. 23, see 2 BARRON & HOLTZOFF, *supra* note 89, §§ 561-72; 3B J. MOORE, *supra* note 9, ¶¶ 23.01-.97; 7 WRIGHT & MILLER, *supra* note 46, §§ 1751-1803; Homburger, *supra* note 216, at 626-55; Starrs, *supra* note 213, at 463-96.

[268] ARIZ. R. CIV. P. 23; COLO. R. CIV. P. 23; DEL. CH. CT. R. 23; IND. R. TR. P. 23; KAN. STAT. ANN. § 60-223 (Supp. 1972); KY. R. CIV. P. 23; MASS. R. CIV. P. 23; MINN. R. CIV. P. 23; MO. REV. STAT. § 52.08 (Supp. 1974); MONT. R. CIV. P. 23; NEV. R. CIV. P. 23; N.D.R. CIV. P. 23; OHIO R. CIV. P. 23; ORE. REV. STAT. § 13.210-410 (1973); S.D. CODE § 15-6-23 (Supp. 1974); TENN. R. CIV. P. 23; UTAH R. CIV. P. 23; VT. R. CIV. P. 23; WASH. R. CIV. P. 23.

[269] FED. R. CIV. P. 23(a). The prerequisites, as stated by the rule, are:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims of the representative parties are typical of the claims or defenses of

quisites, a class action is maintainable where separate actions would bring about inconsistent adjudications which would cause incompatible standards of conduct or adjudications which would be dispositive of the interests of other members of the class;[270] where the party opposing the class has acted or not acted on grounds generally applicable to the class in a way that makes appropriate injunctive or declaratory relief;[271] and where the court finds that common questions of law or fact predominate over individual questions and the class action is superior to any other method of adjudication.[272]

The new rule also provides for broad management powers to be used at the discretion of the trial court. The rule provides for: prior determination of the appropriateness of a class action;[273] the "best notice practicable" and what that notice must contain;[274] guidelines for determining the extent of the class;[275] and the possibility of subclasses for easier management.[276] Additional managerial powers are provided which give the court authority to regulate the class action after litigation has begun.[277] Finally, there can be no dismissal or compromise without the prior approval of the court, and notice of such dismissal or compromise

---

the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Id.

[270] *Id.* 23(b)(1)(A), (B).

[271] *Id.* 23(b)(2). This section has had great utility in injunctive actions against civil rights violations, settling the question of the legality of an act or omission toward a class as a whole. *See* Homburger, *supra* note 216, at 631-34.

[272] FED. R. CIV. P. 23(b)(3). This is the codification of the contemporary approach to the general question or "spurious" class action, although it is broader than what traditionally has been covered by those terms. This section provides:

> (b)An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> . . . .
>
> (3)the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Id.

[273] *Id.* 23(c)(1).

[274] *Id.* 23(c)(2).

[275] *Id.* 23(c)(3).

[276] *Id.* 23(c)(4).

[277] *Id.* 23(d).

must be given to the members of the class.[278]

The greatest problems in federal practice under the new rule have been the aggregation of claims to meet jurisdictional amounts and the question of what notice is the "best practicable under the circumstances."[279]

Although this version of the class action statute is relatively new to the states, there is case law interpreting it. The cases of a few states reveal a determination to make headway in the development of the class action technique. Colorado,[280] Indiana,[281] Montana,[282] North Dakota,[283] South Dakota,[284] Tennessee,[285] Kentucky,[286] Nevada,[287] and Oregon[288] have such sparse case law that little is known other than the fact that class actions are being litigated in those states.

---

[278] *Id.* 23(e).

[279] For a discussion of this federal litigation, see part II *supra*.

[280] *See* Enger v. Walker Field, 508 P.2d 1245 (Colo. 1973) (class suit against governmental action); Hoper v. City & County of Denver, 173 Colo. 390, 479 P.2d 967 (1971) (class suit against governmental action); Colorado Ass'n of Pub. Emp. v. Colorado Civ. Serv. Comm'n, 31 Colo. App. 369, 505 P.2d 54 (1972) (class suit for declaratory judgment of right to pay increase).

[281] *See* Hatcher v. Smith, 283 N.E.2d 582 (Ind. 1972) (class suit by firemen to recover vacation pay, dismissed for procedural failures); Roeschlein v. Thomas, 273 N.E.2d 554 (Ind. Ct. App. 1971), *aff'd*, 280 N.E.2d 581 (Ind. 1972) (class suit against governmental action).

[282] *See* State *ex rel.* Anaconda Alum. Co. v. District Court, 490 P.2d 351 (Mont. 1971) (refusal to review lower court's finding that suit could be handled as a class action).

[283] *See* Horst v. Guy, 211 N.W.2d 723 (N.D. 1973) (class suit against governmental action). In this case written notice was required for all identifiable parties, but publication in the state's four largest newspapers sufficed for the other members. Also, the court held that the class action device was a rule of procedure and did not depend upon jurisdiction over all the parties in order to be binding. *Id.*

[284] *See* Rollinger v. J.C. Penney Co., 86 S.D. 154, 192 N.W.2d 699 (1972) (finding of lower court that class action was improper appealable as a final order since such finding is tantamount to dismissal of the action for all parties but the named plaintiff).

[285] *See* Braddock v. Memphis Fire Ins. Corp., 493 S.W.2d 453 (Tenn. 1973) (affirmed lower court dismissal on grounds irrelevant to class action procedure).

[286] *See* Greer v. Kentucky Health & Geriatric Authority, 467 S.W.2d 340 (Ky. 1971) (class suit against governmental action); Lamar v. Board of Educ., 467 S.W.2d 143 (Ky. 1971) (class suit against governmental action).

[287] *See* Johnson v. Travelers Ins. Co., 515 P.2d 68 (Nev. 1974) (dismissal of class action against company for fraud and breach of contract). The court, in dismissing the class action, stated that it did not mean that a suit for collective deceit may never be maintained. It would be appropriate where "a common thread running through those cases and others is that the fraud element existed and pervaded the transaction at the time of the consumer's purchase." *Id.* at 72.

[288] *See* John Deere Indus. Equip. Co. v. Delphia, 511 P.2d 386 (Ore. 1973) (class action by purchaser against seller on behalf of self and purchasers from seller and another retailer-manufacturer dismissed because of the lack of relation between the two defendant sellers and the purchasers).

Although Arizona courts had allowed a prior class action in an obviously deserving situation,[289] in *Reader v. Magma-Superior Copper Co.*[290] the court relied on *Eisen v. Carlisle & Jacquelin*[291] to deny a class action based on environmental pollution which asked for compensatory and punitive damages. The court stressed the vague and indefinite damages suffered, the impossibility of putting a value on those damages, and the unfeasibility of distributing damages to the class, concluding that dismissal was proper because of the overbreadth of the action on behalf of all residents of a populous county.[292] In closing, however, the court disclosed its awareness of a need for viable class action relief to which an aggrieved group could turn in the proper situation.[293] As though in answer to that recognition, the Arizona appellate court, in *Lennon v. First National Bank*,[294] allowed a counterclaim class action against the plaintiff bank on behalf of all who held check-cashing cards, charging that illegal service charges had been exacted. The court went item-by-item through the requisite factors of Arizona's class action rule. The court then concluded that this was an ideal situation for a class action and denial of the technique here would "emasculate" the class action device.[295]

In *Housing & Redevelopment Authority v. City of Minneapolis*,[296] the Minnesota Supreme Court interpreted its statute to allow great discretion to the trial judge to decide the type of notice required, even allowing notice by publication where the situation is appropriate. The court refused a later class suit in an inverse condemnation action.[297] Still later, however, the court found a class suit appropriate for an action charging usury in *Rathbun v. W.T. Grant Co.*[298] The court recognized that there might be a need for separate future proceedings to determine the individual damages of the class members but stated that this did not preclude a class action on the predominate question common to all members, the violation of the usury statute. Further, the court recognized that usury is a personal defense but held that a class action for the determination of usury was not violative of the statutory provision

---

[289] *See* State v. Boykin, 109 Ariz. 289, 508 P.2d 1151 (1973) (class action against director of public agency for overtime pay).

[290] 110 Ariz. 115, 515 P.2d 860 (1973).

[291] 479 F.2d 1005 (2d Cir. 1973). This case, known as "*Eisen III*," is discussed in part II *supra*.

[292] 515 P.2d at 861-62.

[293] *Id.* at 862.

[294] 21 Ariz. App. 306, 518 P.2d 1230 (1974).

[295] 518 P.2d at 1236.

[296] 293 Minn. 227, 198 N.W.2d 531 (1972).

[297] Alevizos v. Metropolitan Airports Comm'n, 216 N.W.2d 651 (Minn. 1974).

[298] 219 N.W.2d 641 (Minn. 1974).

and that the class action was superior to other methods in promoting the usury statute's public purpose of protecting those who cannot protect themselves.[299]

The history of class actions in Missouri is one of careful adherence to procedure in order to assure that there is adequate representation of the absent parties.[300] Although the courts of that state have long gone beyond the mire of the conceptual problems of community of interest, they have been said to be sidetracked by their overconcern with adequate representation.[301] This fixation continues under the new rule which Missouri recently accepted.[302] The court found the requirement satisfied, however, in *Art Gaines Baseball Camp, Inc. v. Houston*.[303] There, the representative of the class of defendant schools had been chosen previously to the board of control of the schools' activities association. The schools were being sued for a practice of their activities programs that was detrimental to the plaintiff. The court found the process of selection just and equitable despite the fact that it had not been made expressly for the purpose of this litigation. The test of adequate representation was thus satisfied.

Considerable litigation has occurred in Ohio under that state's new class action rule. Ohio has long allowed some limited use of the class action device in the protection of consumers from fraud as well as in other less novel applications.[304] Progress toward more efficient adminis-

---

[299] *Id.* at 652-53. *But see* Evans v. Progressive Cas. Ins. Co., 300 So. 2d 149 (Miss. 1974).

[300] *See, e.g.*, Edgmond v. Brixey, 450 S.W.2d 166 (Mo. 1970) (class action by trustees of church broken with dissention — no evidence of adequate representation); Kansas City Terminal Ry. v. Industrial Comm'n, 396 S.W.2d 678 (Mo. 1965) (class action by railroad to have inspection regulation declared inapplicable to itself and several other industries—no adequate representation); City of Montgomery v. Newson, 469 S.W.2d 54 (St. L. Ct. App. 1971) (class action by city seeking declaratory judgment of right to annex—adequate representation); Molunby v. Shapliegh Hardware Co., 395 S.W.2d 221 (St. L. Ct. App. 1965) (class action by employees for wages—no adequate representation).

[301] Starrs, *supra* note 213, at 480-83.

[302] *See* City of Aurora v. Coleman, 490 S.W.2d 668 (Mo. Ct. App. 1973) (class action by city seeking declaratory judgment of right to annex—no adequate representation). The effects of the new rule on Missouri class action practice are discussed in Fisch, *Notice, Costs, and the Effect of Judgment in Missouri's New Common-Question Class Action*, 38 Mo. L. REV. 173 (1973).

[303] 500 S.W.2d 735 (Mo. 1973).

[304] *See* Robnet v. Miller, 105 Ohio App. 536, 152 N.E.2d 763 (1957) (class action by consumers defrauded by door-to-door sales of purported combination freezer and food plan). *But see* Davies v. Columbia Gas & Elec. Corp., 151 Ohio St. 417, 86 N.E.2d 603 (1949) (class action by purchasers charging that their gas was diluted not allowed—damages depended on widely varying local rates). These cases and the prospects of consumer protection are discussed in Carpenter, *Consumer Protection in Ohio Against False Advertising and Deceptive Practices*, 32 OHIO ST. L.J. 1 (1971).

tration of the class action has continued under the new rule. In *Monroe v. Monroe*,[305] a class action was brought by an Ohio resident of 6 months to have the Ohio statute denying divorces to residents of less than 1 year declared invalid. The action was brought on behalf of the plaintiff and all others similarly situated, clearly a class that could not be ascertained with any great degree of definiteness. In dealing with the problem of notice, the court found that the notice requirement was "inapposite since it is most implausible that any member of the class defined would urge anything other than the invalidation of his statutory disability."[306] In *Miles v. N.J. Motors*,[307] the court allowed a class action on behalf of all persons against whom the defendants had obtained a cognovit deficiency judgment following the repossession of a motor vehicle. The court found the class to number about 400 and therefore too numerous and impracticable to bring before the court. The separate transactions involved and the varying amounts of damages asked is irrelevant where, as in this case, there is a common course of conduct giving rise to the legal rights sought to be enforced. The court discussed past Ohio cases that disallowed relief by class action based on separate transactions[308] but recognized the state's new rule as a departure from the former practice and as authorization of the class action as a means of redressing consumer grievances. Despite this court's considerable willingness to allow class actions, it has recognized the limits of the device. In *Gilmore v. General Motors Corp.*,[309] the class action was a suit for damages on behalf of all Ohio residents who then owned or had ever owned a Corvair. The court found that the action was unmanageable and should be dismissed because the evidence on warranties and injuries would involve the personal experiences of each individual. The court noted that this was a products liability case, and that class action treatment had never been allowed in products liability cases. Further, the court found that the situation demanded separate notice to each individual in the plaintiff class, an impossible situation considering the 70,000 first owners of the vehicles on record and the unknown owners who had purchased used Corvairs.

Delaware, like Mississippi, has retained its chancery court practice. That state, however, shows a considerably more tolerant attitude toward class actions albeit only when the litigants have closely complied

---

[305] 32 Ohio Misc. 129, 289 N.E.2d 915 (C.P. Hamilton County 1972).

[306] *Id.* at 130, 289 N.E.2d at 916.

[307] 32 Ohio App. 2d 350, 291 N.E.2d 758 (1972).

[308] *E.g.*, Colbert v. Coney Island, Inc., 97 Ohio App. 311, 121 N.E.2d 911 (1954) (class action for exclusion from amusement park on basis of race dismissed because each exclusion was a separate transaction).

[309] 35 Ohio Misc. 36, 300 N.E.2d 259 (C.P. Cuyahoga County 1973).

with the procedural requirements under Delaware's new rule.[310] Of particular interest is *Schneider v. Wilmington Trust Co.*[311] wherein the plaintiff class claimed that the defendants charged interest on their credit cards in excess of the legal rate. The court examined and expressly refused to follow the narrow *Tribette* doctrine, but instead found the situation appropriate for a class action and stated that in such situations as this equity will take jurisdiction to adjudicate legal rights and that "it is the very 'multiplicity of suits' to be prevented which constitutes the inadequacy of legal methods and remedies which is the ultimate basis of equity jurisdiction."[312]

E. Recent Developments

Although several state courts are allowing a forum for the adjudication of consumer grievances through class suits, a more significant development is the recent legislation in a few states mandating the option of adjudication of consumer grievances through class actions.[313] The

---

[310] DEL. CH. CT. R. 23; *see* Paul Scotton Constr. Co. v. Mayor & Council, 301 A.2d 321 (Del. Ch. Ct. 1972) (class suit against governmental action); Delaware Bankers Ass'n v. Division of Revenue, 298 A.2d 352 (Del. Ch. Ct. 1972) (class action by bankers to have regulation declared invalid—failed to meet procedural requirements). The latter court stated that although it would allow equity jurisdiction to prevent a multiplicity of suits, it felt that there would be no such multiplicity of suits in this case because a few "test cases" would establish the rights of the parties. *Id.* at 357. Koffler v. McBride, 283 A.2d 855 (Del. Ch. Ct. 1971) (class suit against governmental action failed to meet procedural requirements).

[311] 310 A.2d 897 (Del. Ch. Ct. 1973).

[312] *Id.* at 903.

[313] ALASKA STAT. § 45.50.531 (Cum. Supp. 1973); CAL. CIV. CODE § 1781 (West 1973); IND. ANN. STAT. § 24-5-0.5-4 (Burns 1974); MASS. GEN. LAWS ANN. ch. 93A, § 9(2) (1972); R.I. GEN. LAWS ANN. § 6-13.1-5.2 (Supp. 1973).

The Alaska statute allows the suit only on the prior approval of the attorney general. The Alaska and Rhode Island statutes allow suit for actual damages or $200, whichever is greater.

New Jersey has a statute authorizing the attorney general to sue on behalf of defrauded consumers and gain restitution for those he represents. N.J. STAT. ANN. § 56:8-14 (Supp. 1973). Pennsylvania has a similar statute but it does not provide for restitution of the consumer upon a successful action by the attorney general. PA. STAT. ANN. tit. 73, §§ 201 *et seq.* (1971).

There have been few reported cases under the new consumer class action statutes that allow litigation by the consumer class itself. Those that have been reported are from California. *See* LaSala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971) (class action to have unconscionable trust deeds declared invalid); Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971) (class action for fraud in door-to-door sales and assignment of contracts); Budget Fin. Plan v. Superior Court, 34 Cal. App. 3d 794, 110 Cal. Rptr. 302 (Ct. App. 1973) (class action for fraud in door-to-door sales and assignment of contracts); Anthony v. General Motors Corp., 33 Cal. App. 3d 699, 109 Cal. Rptr. 254 (Ct. App. 1973) (class action to force recall

need for such a method of adjudication has been strongly advocated by numerous authorities,[314] and the failure of Congress to act in the area by providing a statute of national scope has been lamented.[315] Some state consumer class action statutes have been shaped much like the 1966 Federal Rule on class actions,[316] but usually they are a combination of numerous class action procedures and consumer fraud statutes. Some states have had class litigation based upon a basic fraudulent practices statute, but, even when allowed, such cases have often only achieved injunctive relief.[317] The preferable approach appears to be enactment of a specific statute which provides definite procedures to be followed in obtaining class remedies where there is a course of conduct of consumer fraud.

V. Conclusion

A Mississippi attorney will face serious problems in attempting to bring a class action in either state or federal court. Some of the problems in federal court can be circumvented by artful pleading and careful selection of the jurisdictional basis of the suit. There is Mississippi law that, properly pled, could bring some success in state class actions. This law provides a basis upon which the state's courts can build a more practical attitude toward class actions. Absent acceptance of the pleading of this law or the reconsideration of the state's attitude toward class actions, legislation is strongly recommended in order to provide use of this necessary procedural device.

William J. Landers
B. Wayne Vance

---

of vehicles to repair defective parts). Although *Vasquez* was decided before California's consumer class action statute became effective, the court depended on that statute in its opinion.

[314] *See, e.g.*, Annot., 53 A.L.R.3d 534 (1973); Biderman, *Consumer Class Actions Under the New Mexico Unfair Practices Act*, 4 N. Mex. L. Rev. 49 (1973); Carpenter, *supra* note 304; Eckhardt, *supra* note 239; Howell, *supra* note 219; Hurd & Bush, *Unconscionability: A Matter of Conscience for California Consumers*, 25 Hastings L. Rev. 1 (1974); Kirkpatrick, *supra* note 239; Starrs, *The Consumer Class Action—Part I: Considerations of Equity*, 49 B.U.L. Rev. 211 (1969); Starrs, *supra* note 213; Comment, *supra* note 221; Comment, *Consumer Class Actions: A Proposal for Florida*, 26 U. Fla. L. Rev. 58 (1973); 76 Dick. L. Rev. 342 (1972); 39 Fordham L. Rev. 765 (1971); 1 Fordham Urban L.J. 93 (1972).

[315] *See, e.g.*, Eckhardt, *supra* note 239.

[316] *See, e.g.*, Cal. Civ. Code § 1781 (West 1973).

[317] *See* Biderman, *supra* note 314.

THE MISSISSIPPI PUBLIC TRUST DOCTRINE: PUBLIC AND PRIVATE RIGHTS IN THE COASTAL ZONE

Introduction

Demands upon tidal areas for navigation, commerce, fishing, utilization of mineral resources (particularly oil and gas), recreation, aesthetics, and commercial and residential development increase geometrically with increases in population, economy, and leisure time. In order to balance these competing interests, it is imperative that the state meet the requirements of the Coastal Zone Management Act of 1972[1] to establish a comprehensive development plan for the coastal zone.

> In the contemporary concern over the development of coastal zone management programs, it is easy to overlook the fact that a body of law already exists that provides substantial public rights in the land and water resources of the estuaries and the coastal zone. Many of the relevant legal doctrines date from medieval English and even Roman times. These rights should properly form the point of departure for any coastal zone management program.[2]

The most important of these legal doctrines is the public trust doctrine. Yet, even after its evolution through Roman law, English common law, early American law, and the various state laws, the scope and limits of the public trust doctrine remain uncertain. This comment will develop the basic concepts of the Roman, English, early American, and Mississippi theories of the public trust; suggest changes in the Mississippi public trust doctrine which are designed to promote title certainty and to allow the most advantageous development of the tidal areas; and conclude that the public trust doctrine should be absorbed by the coastal zone management plan as a land-and-water-use planning device useful to the state coastal zone management agency in regulating, balancing, developing, and preserving public and private rights in the tidal areas.

I. History of the Public Trust Doctrine

Of things that are common to all any one may take such a portion as

---

[1] 16 U.S.C. §§ 1451-64 (Supp. II, 1972). *See generally* 38 Fed. Reg. 33044 (1973). Discussion of this act is beyond the scope of this comment. *See also* Ausness, *Land Use Controls of Coastal Areas*, 9 Calif. W.L. Rev. 391, 401-13 (1973). For information concerning the status of Mississippi's coastal zone management plan, contact the Mississippi Marine Resources Council, P.O. Box 497, Long Beach, Mississippi 39560.

[2] Schoenbaum, *Public Rights and Coastal Zone Management*, 51 N.C.L. Rev. 1, 4 (1972) (footnote omitted).

> he pleases. Thus a man may inhale the air, or float his ship on any part of the sea . . . . The seashore, that is, the shore as far as the waves go at furthest was considered to belong to all men . . . . Individuals, if they built on it, by means of piles or otherwise, were secured in exclusive enjoyment of the portion occupied; but if the building were taken away, their occupancy was at an end, and the spot on which the building stood again became common.[3]

This was the Roman law. The public had a right to fish, to navigate, and to use freely a tidal zone which belonged to neither any individual nor the Roman people, although it was incumbent upon the latter to ensure free use.[4]

With the decline of the Roman Empire, public ownership of shores and waterways was undermined by local control and, later, feudal units. In England, sovereign power over the tidal areas became confused with private property rights of the sovereign;[5] all of the land was his to do with as he pleased. It followed that if it was to his advantage to give or to barter away land that could be put to a profitable use, he could do so. There was no assertion of public right in any such land or land under navigable water at that time.[6]

Formal protest against arbitrary sovereign power came in the form of Magna Carta. The relevant provision provided that all kydells (fish trapping devices) should be removed from the Thames and Medway Rivers throughout England except on the seashore. Authorities differ as to whether this provision limiting the King's power over water was directed toward freedom of fisheries[7] or freedom of navigation.[8] One author believes that because of poor roads, the rivers were necessary for transportation;[9] another thinks that kydells located at the mouths of rivers substantially interfered with fishing opportunities downsteam and only incidentally interfered with what little navigation there was.[10] Regardless of the original reason for the provision, it has been interpreted by

---

[3] THE INSTITUTES OF JUSTINIAN 91 (7th ed. T. Sandars transl. 1970).

[4] *Id.* at 91-92.

> The public use of the sea-shore, too, is part of the law of nations, as is that of the sea itself; and therefore, any person is at liberty to place on it a cottage, to which he may retreat, or to dry his nets there, and haul them from the sea; for the shores may be said to be the property of no man, but are subject to the same law as the sea itself, and the ground or sand beneath it.

Id. at 92 n.5.

[5] Comment, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 YALE L.J. 762, 764-65 (1969).

[6] 1 H. FARNHAM, WATERS AND WATER RIGHTS § 36, at 166-67 (1904).

[7] *Id.* at 167.

[8] W. MCKECHNIE, MAGNA CARTA 343 (2d ed. 1914).

[9] *Id.*

[10] 1 H. FARNHAM, *supra* note 6, § 36, at 167.

most courts and writers as prohibiting a monopoly on fishing rights.[11] Magna Carta did not immediately destroy the King's power to grant exclusive fishing rights, but public sentiment against such grants grew with public necessity for free fishing, and eventually a rule of law to that effect emerged.

Although Magna Carta expressly excluded the seashore from its mandate, public waters were first defined as those which partook of the nature of the sea. Title to inland waterways was considered to be in the riparian owner; therefore, law governing public rights in water developed in the tidal areas and spread inland by analogy.[12] The theory that the Crown owned submerged lands as representative for the public had its genesis in a treatise written by Thomas Digges in the 16th century.[13] Digges reasoned that the Crown owned all tidal water and tidelands by virtue of the fact that the Crown was the chief personage of the kingdom and should, therefore, own the most important water, the sea, even though the Crown had previously granted most of the land away.[14] Digges further proposed that the Queen owned the foreshore as part of

---

[11] W. McKechnie, *supra* note 8, at 343.

[12] 1 H. Farnham, *supra* note 6, § 36, at 167.

> [F]oreshore is defined as that part of the shore that lies between the ordinary high- and low-water marks and is daily traversed by the oscillating water line as the tides rise and fall. This corresponds to the legal definition of the term *shore* . . . .

D. Johnson, Shore Processes and Shoreline Development 161 (1919); *see* A. Shalowitz, Shore and Sea Boundaries 344-45 (1964).

The legal definition of "shore" can be found in Borax Consol. Ltd. v. City of Los Angeles, 296 U.S. 10, 22-23 (1935). For a discussion of tides and tidal boundaries, see Comment, *Fluctuating Shorelines and Tidal Boundaries: An Unresolved Problem*, 6 San Diego L. Rev. 447 (1969).

Tidelands are those lands lying between the mean high-and-low-tide lines which are covered and uncovered successively by the ebb and flow of the tides. Marks v. Whitney, 6 Cal. 3d 255, 257-59, 491 P.3d 374, 378-79, 98 Cal. Rptr. 790, 794-95 (1971). "Foreshore" has been used in "later English decisions . . . to denote the shore and bed of the sea, and of every channel, creek, estuary, and of every navigable river of the United Kingdom as far up the same as the tide flows . . . ." J. Gould, A Treatise on the Law of Waters § 27, at 61 n.1 (3d ed. 1900). This broader definition of the foreshore is analogous to the description of lands that are subject to the public trust doctrine in Mississippi. This broader definition is also the test for navigability of English waters: Waters are navigable which are subject to the ebb and flow of the tide. The Mississippi public trust doctrine is limited to waters (and the submerged lands beneath such waters) that are navigable in the English sense. State *ex rel.* Rice v. Stewart, 184 Miss. 202, 184 So. 44 (1938). For a discussion of other definitions of navigability, see the authorities cited note 59 *infra*.

The terms "foreshore," "tidelands," "public trust lands," "submerged lands," and "shore" will be used in this comment to denote the same areas that are encompassed in the broader English definition of foreshore.

[13] 1 R. Clark, Water and Water Rights § 36.3(A) (1967).

[14] 1 H. Farnham, *supra* note 6, § 36, at 167-68.

the great, ungranted wastelands of the kingdom.

Although Digges was refuted on every point in asserting title in the Crown,[15] his theory was readily accepted by the Stuart kings, who saw a source of unlimited revenue in disposing of the tideland. The principle hardly benefited them; the attempt to make use of it was a cause of the deposition of Charles I.

Digges' theory, however, eventually led to a rule of law articulated by Lord Hale in the 17th century which placed the burden on the landowner to prove that his land grant extended to the low-water mark by showing that the grant expressly gave him the land subject to the ebb and flow of the tide.[16] If he was unable to prove this (which was generally the case since the grants were usually vague) then the King owned the land as an attribute of sovereignty.[17] The presumption of ownership in the Crown assumed that the King seldom parted with his right of property, the *jus privatum*.[18] Lord Hale further established that the public had a *jus publicum*, an interest in passage with their goods by water which should not be obstructed by nuisances. The King could convey the land into private hands, but when he did, the *jus privatum* was burdened with the *jus publicum*.[19] The *jus publicum* was inalienable, and whether or not the *jus privatum* was granted, the *jus publicum* survived.[20]

As English commerce expanded, demand grew for freer use of tidal areas. Statutes and case law, reflecting this demand, expanded public rights. The King's theoretical role was reduced to one of trustee of the foreshore for a public whose rights were too important to be superseded. This public trust in turn was refined into particular easements or rights in the public, accordingly limiting private property rights.[21]

The Crown's power to grant the land under the waters into private hands, subject to public rights in navigation and fishery, continued until passage of statutes requiring the Crown to make a general grant of waste lands to the public to be administered for the public good. Even now the Crown, with parliamentary consent, can make private grants of submerged land for reclamation if it is considered more in the public interest than the public right of navigation and fishery. Whether in the

---

[15] *Id.* § 39, at 181.

[16] *Id.* Hale was counsel for the Crown as early as 1647. His treatise, *De Jure Maris*, announcing his rule of law, was not published until 1787. 1 R. CLARK, *supra* note 13, §36.3(A), at 191 n.54.

[17] 1 R. CLARK, *supra* note 13, § 36.3(A).

[18] Fraser, *Title to the Soil Under Public Waters—A Question of Fact*, 2 MINN. L. REV. 313, 321 (1918).

[19] 1 H. FARNHAM, *supra* note 6, § 36, at 167-68.

[20] Fraser, *supra* note 18, at 321.

[21] Comment, *supra* note 5, at 768-69.

Crown or in a private person, title is subject to the public use, and private title cannot be used to injure public rights.[22]

In the United States, however, the courts have established unnecessary, conflicting rules. The prerogative power of the Crown has been transformed into a trust, resulting in decisions that would have been impossible under common law.[23]

The English Crown, through charters, gave the American colonists all of the King's rights in the new lands.[24] One such charter was the subject of *Martin v. Waddell*,[25] the first United States Supreme Court case concerning the public trust doctrine. Charles II granted to his brother, the Duke of York, territory which is now the State of New Jersey.[26] The land was subsequently granted to Waddell, who planted oysters on it and brought an action to eject Martin, who was interfering with the fishery.[27] The Supreme Court held that the Crown had granted its governmental, but not its private, right to the grantee; title to the upland could be passed by the grantee, but not title to the foreshore. *Waddell* has been described as a "most unfortunate decision not only because of its entire misapprehension of the principles involved, but because of its influence upon the subsequent course of decisions in this country."[28] The common law would have preserved the rights of the public by subjecting a grant of submerged lands to the public rights of navigation and fishery. The Court seems to have relied exclusively on *Arnold v. Mundy*,[29] a New Jersey case holding that under the King's grant, the Duke of York, as governor of the province, was exercising royal prerogatives for the public benefit and, as proprietor of the soil, for his own benefit. The *Arnold* court said that when the American Revolution severed the colonies from England, these royal rights vested in the people of the states, together with the power to dispose of them. The court ignored the King's power to grant private title to the foreshore, and the fact that private title was granted to the Duke of York,

---

[22] 1 H. FARNHAM, *supra* note 6, § 36, at 170.

[23] *Id.* at 171-72.

[24] *Id.* § 42, at 198.

[25] 41 U.S. (16 Pet.) 367 (1842).

[26] [T]ogether with all "lands, islands, soils, rivers, harbours, mines, minerals, quarries, woods, waters, lakes, fishing, hawkings, huntings, and fowlings, and all other royalties, profits, commodities, and hereditaments to said several islands, lands, and premises belonging and appertaining, with their and every of their appurtenances, and all our estate, right, title, interest, benefit, advantage, claim and demand, of, in, or to said lands and premises, or any part or parcel thereof . . . ."

Id. at 370.

[27] 1 H. FARNHAM, *supra* note 6, § 42a, at 203.

[28] *Id.* at 202.

[29] 6 N.J.L. 1, 10 Am. Dec. 356 (Sup. Ct. 1821).

who subsequently granted it away subject to the public rights. At the time of these grants, it should be noted, Charles II did not recognize any trusteeship and continued to grant territory in the New World at his pleasure, the grantees of the King taking the King's whole title. The Thirteen Original States, however, took title to all of the shore not granted by the Crown—or rather those subject to Crown grants which they chose not to recognize.

Each state originally could dispose of and regulate the foreshore as it wished. Most states made no express provisions. Massachusetts, however, provided that a grant of the upland passed title to the low watermark. Later, Washington chose to retain title to tidelands unless the grant expressly provided otherwise. In most states, however, the courts have been delegated the duty of determining the extent of the riparian owner's title. The great majority of the courts have held that, absent express language to the contrary, a grant of the upland does not convey the tideland, and the tideland remains in the ownership of the public.[30] This follows the common law presumption of prima facie title in the sovereign.

In *Shively v. Bowlby*[31] the United States Supreme Court reevaluated the interpretation given to the common law in *Waddell* and stated:

> By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high watermark, within the jurisdiction of the Crown of England, are in the King. . . . [T]heir natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects. Therefore the title, *jus privatum*, in such lands, as of waste and unoccupied lands, belongs to the King as the sovereign; and the dominion thereof *jus publicum*, is vested in him as the representative of the nation and for the public benefit.
>
> . . . .
>
> . . . "This [the shore] doth prima facie and of common rights belong to the King, both in the shore of the sea and the shore of the arms of the sea." . . . "Yet they may belong to the subject in point of propriety, not only by charter or grant, whereof there can be but little doubt, but also by prescription or usuage [*sic*]."
>
> . . . .
>
> [A]nd that this title, *jus privatum*, whether in the King or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing.[32]

---

[30] 1 H. FARNHAM, *supra* note 6, §§ 42a-43.

[31] 152 U.S. 1 (1893).

[32] *Id.* at 11-13.

The Court further stated that after the American Revolution all rights of the Crown and Parliament vested in the several states, and that the title of the riparian owner is governed by the local law of the states.

The Court held in *Pollard's Lessee v. Hagan*[33] that the land between high and low tide was held in trust by the federal government for the territories, so that when they attained statehood, title to the tidelands vested in them. The rationale for the holding was that the new states were admitted on an equal footing with the original states.[34]

The public trust has been extended to inland waterways, including the Great Lakes. One landmark public trust case dealt with a grant of submerged land in Lake Michigan. The rule that a state may alienate both the *jus privatum* and the *jus publicum* in lands which are subject to the public trust doctrine if the alienation serves a public purpose was set forth in *Illinois Central Railroad Co. v. Illinois*,[35] acclaimed by one writer as the "lodestar" in American public trust law.[36] In 1869 the Illinois Legislature granted virtually all of the commercial waterfront and the submerged lands of Lake Michigan adjacent to Chicago to the Illinois Central Railroad Company; the grant involved more than 1,000 acres.[37] The 1873 legislature repealed the 1869 grant after realizing its extent. In the subsequent suit, the Supreme Court upheld the repealing act and declared the 1869 grant invalid: "There can be no irrepealable contract in a conveyance of property by a grantor in disregard of the public trust, under which he was bound to hold and manage it."[38]

In *Illinois Central*, the Court did not bar alienation of public trust lands to private persons; it made prohibition of state abdication of control over trust lands a question of degree. A grant as vast as the one made in 1869 by the Illinois Legislature—most of Chicago's harbor—is, in effect, an abdication of legislative authority over navigation, commerce, and fishing.[39]

> It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled . . . . The State can no more abdicate its trust over property in which

---

[33] 44 U.S. (3 How.) 212 (1845).

[34] Comment, *Tideland Ownership—Time for Reform*, 36 U. CIN. L. REV. 121, 125 (1967).

[35] 146 U.S. 387 (1892); 1 H. FARNHAM, *supra* note 6, § 36a, at 175.

[36] Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489 (1969).

[37] 146 U.S. at 454.

[38] *Id.* at 460.

[39] Sax, *supra* note 36, at 489.

> the whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of peace.[40]

Illinois Central limits state alienation of public trust lands to conveyances enhancing the public interest, or to those which do not substantially impair the public interest in the lands and waters remaining.[41] There is, however, some question as to whether the latter part of this limitation permits alienation of public trust lands to private persons for private purposes.[42] When considered in the *Illinois Central* context, the phrase "which when occupied do not substantially impair the public interest in the lands and waters remaining" appears to mean that a state may alienate public trust lands to private persons for public purposes if the alienation is not so vast that it substantially impairs the public interest in the lands and waters remaining. This limitation does not sanction conveyances to private parties for private purposes. The above quoted portion of the *Illinois Central* opinion, nevertheless, has been cited as authority for the proposition that a state may alienate both the *jus privatum* and the *jus publicum* to private persons for private purposes, extinguishing the public interest in the alienated, submerged lands.[43] Regardless of the interpretation given to this "generally recognized exception to or modification of the trust doctrine,"[44]

> no state has adhered to the view that the public interest may be alienated in fee to private persons without regard to the utility and need of the property for navigation, and without assurance that the property will be used to promote at least a quasi-public purpose . . . .[45]

Since 1845 rights in tidelands and lands under navigable waters have been governed by state, not federal, law.[46] "[A]lthough the states

---

[40] 146 U.S. at 453.

[41] *Id.* at 452-53, 455-56.

[42] The point at which a purpose changes from public to private varies from court to court. *See* Treuting v. Bridge & Park Comm'n, 199 So. 2d 627 (Miss. 1967) (conveyance with 27 percent of alienated tidelands devoted to public use as compared to 53 percent devoted to commercial, residential, and resort development held to be for public purpose).

[43] Appleby v. City of New York, 271 U.S. 364, 394-97 (1926); Pembroke v. Peninsular Terminal Co., 108 Fla. 46, 146 So. 249, 257 (1933). For a discussion of Florida's public trust doctrine, see Nelson, *State Disposition of Submerged Lands Versus Public Rights in Navigable Waters*, 3 NATURAL RESOURCES LAW. 491, 499-500 (1970); Richard, *Tidelands and Riparian Rights in Florida*, 3 MIAMI L.Q. 339, 346-62 (1949).

[44] Pembroke v. Peninsular Terminal Co., 108 Fla. 46, 146 So. 249, 257 (1933).

[45] 1 R. CLARK, *supra* note 13, §36.4(A), at 196. "The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion . . . ." FTC v. Ruberoid Co., 343 U.S. 470, 487-88 (1952) (dissenting opinion).

[46] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845).

acquired this land pursuant to federal law, they are not restricted by that law in their subsequent dealing with it."[47] The Supreme Court generally has allowed the states to decide the question of ownership for themselves. For this reason the remaining portion of the comment will consist of a discussion of current public trust law in Mississippi and suggestions for change.

II. MISSISSIPPI PUBLIC TRUST THEORY

> Of all the difficult questions which have arisen in the application of the laws to questions involving water rights, there is none which has produced more uncertainty, caused conflict of opinion, or produced more diverse results than that relating to the title to the land under the waters.[48]

Nowhere is this better illustrated than in the Mississippi Supreme Court decisions dealing with the public trust doctrine.[49]

In *Money v. Wood*,[50] the Mississippi Supreme Court held that section 81 of the state constitution aligned Mississippi with the authorities holding that the state cannot convey public trust lands in fee to private owners for private purposes.[51] *Money*, however, does not stand for the

---

[47] 1 R. CLARK, *supra* note 13, § 36.4(A), at 196 n.81; *see, e.g.*, Clineburg & Krahmer, *The Law Pertaining to Estuarine Lands in South Carolina*, 23 S.C.L. REV. 7 (1971); Sax, *supra* note 36 (Massachusetts, Wisconsin and California); Comment, *Private Fills in Navigable Waters: A Common Law Approach*, 60 CALIF. L. REV. 225 (1972) (California and Washington); Comment, *Maryland's Wetlands: The Legal Quagmire*, 30 MD. L. REV. 240 (1970); Comment, *Defining Navigable Waters and the Application of the Public-Trust Doctrine in North Carolina: A History and Analysis*, 49 N.C.L. REV. 888 (1971); Comment, *supra* note 34; Note, *Conveyances of Sovereign Lands Under the Public Trust Doctrine: When Are They in the Public Interest?*, 24 U. FLA. L. REV. 285 (1972).

[48] 1 H. FARNHAM, *supra* note 6, § 36, at 165.

[49] Mississippi also has a public trust statute:

> All seafoods existing or living in waters within the territorial jurisdiction of the State of Mississippi not held in private ownership legally acquired, and all beds and bottoms of rivers, streams, bayous, lagoons, lakes, bays, sounds and inlets bordering on or connecting with the Gulf of Mexico or Mississippi Sound within such territorial jurisdiction, including all oysters and other shell fish and parts thereof grown thereon, either naturally or cultivated, shall be, continue, and remain the property of the State of Mississippi, to be held in trust for the people thereof until title thereto shall be legally divested in the manner and form hereinafter authorized, and the same shall be under the exclusive control of the commission [Mississippi Marine Conservation Commission] until the right of private ownership shall vest therein as hereinafter provided.

MISS. CODE ANN. § 49-15-5 (1972). This section has been interpreted as a restatement of the public trust doctrine in Mississippi. Parks v. Simpson, 242 Miss. 894, 905, 137 So. 2d 136, 140 (1962).

[50] 152 Miss. 17, 118 So. 357 (1928).

[51] *Id.* at 29, 118 So. at 359.

proposition that the state cannot convey public trust lands to private owners under any circumstances.[52] The appellant had purchased submerged lands in the Mississippi Sound at the west end of Deer Island for the purpose of constructing an artificial island with hotels and residences. The appellee challenged the right of the land commissioner to sell the submerged lands, alleging that the construction would interfere with the public use of the waters as well as damage his property on Deer Island. The court, after discussing *Illinois Central*, stated that section 81 of the Mississippi constitution of 1890[53] prevented the conveyance of public trust lands to private persons for private purposes. It was not necessary to base this decision on section 81; the court had available to it a line of authority "which holds that the state, as trustee, has no right or power to dispose of such [public trust] lands in any manner or extent inconsistent with the purpose for which the trust exists . . . ."[54] The Mississippi Supreme Court had used this common law public trust doctrine as early as 1857, in *Martin v. O'Brien*.[55] By using it, the court could have avoided the later inconsistency in *Treuting v. Bridge & Park Commission*.[56]

In the 1938 case of *State ex rel. Rice v. Stewart*,[57] Stewart and others installed machinery to dredge sand and gravel for commercial purposes from the bed of Bayou Bernard (which is subject to the ebb and flow of the tide) and obtained from it a large amount of sand and gravel. The

---

[52] *Money* has been interpreted as standing for the proposition that the state cannot convey public trust lands to private ownership—an extreme form of the majority rule. 1 R. CLARK, *supra* note 13, § 37.2(C), at 208.

[53] "The Legislature shall never authorize the permanent obstruction of any of the navigable waters of the State. . . ." MISS. CONST. art. 4, § 81.

[54] 152 Miss. at 29, 118 So. at 359.

[55] 34 Miss. 21 (1857).

> It is said that no power existed in the State to grant the exclusive right and occupation of the shores of the sea to any man, because the sea, by universal law, is open and free to all persons. This is correct with respect to the open or high seas, but it does not apply to the shores of the sea, or to the waters immediately adjacent to those shores. 1 Kent's Comm. 26, 29. In such cases the jurisdiction of the State extends so far as may be necessary for the public safety and the undisturbed use of the adjacent shores. But the shores of the sea below high water mark belong to the State as trustee for the public, and may, by grant, become private property, or the subject of an exclusive private right; and the right of the owners bounded by the sea extends no further than to high water mark. 3 Kent, 427.

Id. at 36. *Compare* Crary v. State Highway Comm'n, 219 Miss. 284, 295-96, 68 So. 2d 468, 472 (1953) ("Martin v. O'Brien . . . involved statutes and common-law rules in existence prior to Sec. 81 of the Const. of 1890, and are not controlling here."), *with* Treuting v. Bridge & Park Comm'n, 199 So. 2d 627, 632 (Miss. 1967) ("[T]he trust character of the state's title and ownership is not constitutional but common-law doctrine.").

[56] 199 So. 2d 627 (Miss. 1967).

[57] 184 Miss. 202, 184 So. 44 (1938).

bill of complaint sought to enjoin further operation and to recover damages for the sand and gravel already removed.[58] Stewart and his associates contended that as riparian owners they owned the bed of the bayou. After a detailed discussion of the common law public trust doctrine and the English and American tests for navigability,[59] the court held that the state is

> the absolute owner of the title of the soil, and of the minerals therein contained, in the beds of all its shores, arms and inlets of the sea, wherever the tide ebbs and flows, as trustee for the people of the State, and subject only to the paramount right of the United States to control commerce and navigation, with the consequent right to use or dispose of any portion thereof, when that can be done without impairment of the interest of the public in the waters, subject to the paramount right above mentioned, and not inconsistent with Section 81 of our constitution. Illinois Central R. Company v. Illinois, Money et al. v. Wood, but without the right to convey the title of the land beneath such waters below high-water mark in fee simple, Rouse v. Saucier's Heirs, the State [is] without authority to surrender its sovereignty or cease to administer the trust for the purposes intended . . . .[60]

In what must be one of the longest of holding sentences, the court left out six very important words which should precede the citation of *Rouse*: "to private owners for private purposes." *Stewart* does not place an absolute restriction on the alienation of public trust lands; it merely prohibits conveyances of public trust lands in fee simple to private persons for private purposes.[61] Again, the reference to section 81 was unnecessary; one of the best established features of the public trust doctrine, protection of navigation,[62] would have sufficed.

For the next three decades the Mississippi public trust cases dealt mainly with the rights of littoral owners in the adjacent tidelands.[63] In 1967, in *Treuting v. Bridge & Park Commission*,[64] the Mississippi Supreme Court upheld a sale of reclaimed public trust lands to private persons for private purposes. Ironically, the land involved in *Treuting*

---

[58] For a discussion of remedies, see text accompanying notes 134 through 143 *infra*.

[59] For a discussion of the distinction between the English and American tests for navigability, see 1 R. CLARK, *supra* note 13, § 37; Comment, *Navigable Waters—Use by Pleasure Boats as Test Whether Man-made Stream Is Public Water*, 33 N.Y.U.L. REV. 229 (1958).

[60] 184 Miss. at 230-31, 184 So. at 50 (citations omitted).

[61] Rouse v. Saucier's Heirs, 166 Miss. 704, 713, 146 So. 291, 292 (1933).

[62] Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973).

[63] *See, e.g.*, Xidis v. City of Gulfport, 221 Miss. 79, 72 So. 2d 153 (1954); Crary v. State Highway Comm'n, 219 Miss. 284, 68 So. 2d 468 (1953).

[64] 199 So. 2d 627 (Miss. 1967).

was in the same area as that involved in *Money*—the west end of Deer Island. By general legislation, the state had authorized the sale of the island and adjacent submerged lands to the commission. The law further provided for the sale by the commission to private persons or corporations for private purposes such lands that had become unnecessary for public use. The commission's plan for the development of the area included: 27 percent of the land to public uses, 20 percent to streets and utilities, and the remaining 53 percent to residential, commercial, and resort development. The commission brought suit against the State of Mississippi to confirm its title to the west end of the island and 150 acres of adjacent tidelands. The court noted that because "Biloxi is a densely populated municipality . . . in urgent need of physical space for expansion," the legislature authorized the commission to dredge, fill in, and reclaim the adjacent tidelands, which were "not susceptible to reasonable navigation at all times as a practical matter," pursuant to an overall plan for the needed development. The first obstacle that the court had to overcome in upholding the state's original conveyance of the tidelands to the commission was section 81 of the Mississippi constitution as interpreted in *Money*. The court, in effect, overruled that interpretation. The term "navigable waters," as used in section 81, had meant navigable in the technical sense ever since *Money*. Waters are technically navigable at common law if they are subject to the ebb and flow of the tide.[65] "Tide" in Mississippi is the English common law standard of mean high water as determined over an 18.6-year tidal cycle.[66] The court in *Treuting* concluded that shallow and shoal waters which are not susceptible of reasonable navigation did not come within the prohibition of section 81. The court then discussed *Money*:

---

[65] State *ex rel.* Rice v. Stewart, 184 Miss. 202, 225, 184 So. 44, 47 (1938). Mississippi has a rather quaint definition of navigable waters:

> All rivers, creeks and bayous in this state, twenty-five miles in length, and having a sufficient depth and width of water for thirty consecutive days in the year to float a steamboat with carrying capacity of two hundred bales of cotton, are navigable waters of this state and public highways.

MISS. CODE ANN. §§ 1-3-31, 51-1-1 (1972). In a more unusual decision the Mississippi Supreme Court held that even though sections 1-3-31 and 51-1-1 adopted the navigable-in-fact test for determining which waters are considered navigable, the sections did not affect the meaning of "navigable waters" as used in section 81 of the state constitution. The meaning must be determined according to the meaning of the term at the time the constitution was adopted; *i.e.*, waters that were subject to the ebb and flow of the tide were navigable in 1890. This specious reasoning led to the result that the court desired: The construction of a dam on a section of the Pearl River, navigable-in-fact but not in the technical sense, did not violate section 81 of the state constitution even though the dam created a permanent obstruction to navigable waters. Culley v. Pearl River Indus. Comm'n, 234 Miss. 788, 811-12, 108 So. 2d 390, 398 (1959).

[66] 44 MISS. L.J. 322, 324 n.8 (1973).

> The indication therein that section 81 of the Constitution prohibited the sale of submerged land was unnecessary to the decision of that case. . . . In short, the trust character of state's title and ownership is not constitutional but common-law doctrine.[67]

The next obstacle faced by the *Treuting* court was the Mississippi public trust doctrine's prohibition of conveyances of the public trust lands to private persons for private purposes.[68] The court stated that under the common law, "the State may dispose of submerged lands under tidal waters to the extent that such disposition will not interfere with the public's right of navigation, swimming and like uses."[69] The court also pointed out that littoral owners' rights must not be compromised. Up to this point, the court restated the common law rule allowing the alienation of the *jus privatum* but not the *jus publicum* (the private ownership of the soil is subject to the public trust easements).[70] The court still had to answer two questions: Could the state convey public trust lands to the commission for these particular public purposes, thereby alienating the *jus publicum*? If so, to what extent could the commission make conveyances to private persons for private purposes before the overall purpose shifted from public to private? The court concluded that in light of modern technology, expanding population, and increased leisure time the development of Deer Island was a public purpose which was consistent with the public trust and that there would be no substantial interference with the original purposes of the trust.[71] The conveyance to private persons was held not to negate the comprehensive public purpose since the totality of the development promoted the public interest.[72]

---

[67] 199 So. 2d at 632.

[68] The fact that the reclamation of the tidelands, ostensibly for public purposes, occurred while the commission owned them does not change the result—tidelands were conveyed to private persons for private purposes. The court recognized this in International Paper Co. v. Mississippi State Highway Dep't, 271 So. 2d 395, 399 (Miss. 1972).

[69] 199 So. 2d at 632-33.

[70] For a discussion of the public trust easements, which are also referred to as the public purposes of the trust, see text accompanying notes 86 through 95 *infra*.

[71] The primary purpose of the English public trust doctrine was the protection of navigation, commerce and fishing. In *Treuting*, the court noted that the English had not given any thought to the filling of mud flats and other marginal tidelands that were unsuitable for navigation. For the first time, the Mississippi Supreme Court appeared to recognize that blind adherence to the traditional public trust easements without taking into account changing public interests may be inconsistent with the public trust protection that the state owes to its people. 199 So. 2d at 633. The public trust is dynamic; the law should change as society's needs change. *See* text accompanying notes 149 through 154 *infra*.

[72] "[T]he incidental private ownership of parts of the development is not inconsistent with the public trust in the submerged lands. In essence it is an effectual development and discharge of this trust." 199 So. 2d at 634.

Although the Mississippi Supreme Court has long claimed adherence to the English common law public trust doctrine, *Treuting* is the only opinion in which the court used the doctrine as it existed in England.[73] The following quotation describes the basis of that doctrine and the manner in which some courts have erred:

> The courts of several states [including Mississippi], regarding the way which the state's title to the subaqueous lands is derived, use language that would limit the interest acquired, or the manner in which it may be enjoyed. They call it a sovereign or prerogative and not a proprietary right. It is true that the title passes to the state as an incident of sovereignty. But analysis of the cases from which the doctrine originated shows that every right in the lands passes which the United States had before. Cognizance should be taken of the fact that the United States had a proprietary right and exercised a power of disposition over those lands during the territorial status, and the interest and power of the state should be held to be equally extensive. There is no reason for limiting the power of the state more narrowly than the power of the crown or of the United States was limited. And we have seen that they could use or dispose of such interests as could be enjoyed subject to the public right. The sovereign should be able to make such use of each interest in the lands as may best subserve the public good directly or indirectly.[74]
>
> As sovereign, it [the state government or the United States government in territories] has the *jus publicum*, or right of jurisdiction and control of the shores for the benefit of the public . . . ; while, as proprietor, it has the *jus privatum*, or right of private property, which it can grant to private individuals subject to the *jus publicum*.[75]

The court in *Treuting* acknowledged that if a use only indirectly served the public interest, that use was not necessarily inconsistent with the public trust doctrine. Whether the court would reach the same decision in a *Treuting* fact situation today would depend upon the court's environmental and ecological awareness; it could be argued that ecology and aesthetics are part of the *jus publicum*. This argument is not inconsistent with the public trust doctrine set forth in *Treuting*, since the public trust doctrine does not limit the *jus publicum* to protection of navigation, commerce, and fishing. The *jus publicum* should have the sponge-

---

[73] For a historical analysis, see text accompanying notes 4 through 29 *supra*.

[74] Fraser, *Title to the Soil Under Public Waters — The Trust Theory*, 2 MINN. L. REV. 429, 445 (1918). *Compare* Money v. Wood, 152 Miss. 17, 28, 118 So. 357, 359 (1928) (The King held tidelands "as trustee in his sovereign capacity . . . and not . . . in a proprietary capacity."), *with* State *ex rel.* Rice v. Stewart, 184 Miss. 202, 224, 184 So. 44, 47 (1938) ("[I]n England the crown, and in this country the people, have the absolute proprietary interest in [tidelands].").

[75] 1 H. FARNHAM, *supra* note 6, § 10, at 48-49.

like characteristic of being able to encompass and absorb additional public uses as the public need changes. On the other hand, the *jus publicum* should be able to free itself from any uses which, as a result of changes in public needs, are no longer vital to the public interest.

In 1972, in *International Paper Co. v. Mississippi State Highway Department*,[76] the court characterized *Treuting* as "an exception to the general rule which prohibits the sale by a trustee to anyone for a private purpose." The court limited *Treuting* to its facts: "Special legislation directed to a particular area" authorizing a sale that was valid because the public purpose "was clearly paramount to the private interest."[77] In spite of this limitation, *Treuting* probably remains the best statement of the public trust doctrine as it exists or should exist, in Mississippi.[78]

In *International Paper*, the plaintiff paper company sought an injunction against the Mississippi Highway Department to prevent its entering upon Lowry Island to mark the course of Interstate 10. The highway department, relying on the public trust doctrine, contended that title to the land in question was in the State of Mississippi. In 1817, when Mississippi was admitted to the Union, this area was interspersed with islands and marshes and subject to the ebb and flow of the tide. Between 1817 and 1884 the elevation of the area increased due to natural accretion so that portions of the area were no longer subject to the ebb and flow of the tide, becoming "fast dry land." In 1884, Lowry Island was surveyed and sold pursuant to an act of the Mississippi Legislature. The International Paper Company acquired title to the area in question by mesne conveyances in 1967 and paid taxes on the land as had its predecessors in title. The court held the sale pursuant to the 1884 act invalid and that title to the marshlands (subject to the ebb and flow of the tide) *and* to the fast dry lands was in the state; the state was not estopped from asserting its title.

Neither the decision regarding the marshlands nor the one regarding the fast dry lands should be allowed to stand. The court's decision with respect to the marshlands was based upon a simplistic view of Mississippi's public trust doctrine: the state cannot convey title to tidelands in fee simple to private owners for private purposes. This view fails to consider the common law adopted by the Mississippi Supreme Court, allowing the *jus privatum* to be conveyed to private owners for private purposes, always subject to the *jus publicum* and the rights of littoral owners.

In holding the conveyance of the marshlands void, the court in

---

[76] 271 So. 2d 395 (Miss. 1972), *cert. denied*, 414 U.S. 827 (1973), *noted in* 44 MISS. L.J. 322 (1973).

[77] 271 So. 2d at 399.

[78] *See* text accompanying notes 144 through 158 *infra*.

International Paper probably did not technically violate the constitutionally protected right to contract.[79] The conveyance was made pursuant to special legislation directed to a particular area, as was that upheld in *Treuting*, and an equal protection violation is arguable. Possible constitutional questions aside, the decision is inequitable; the rights of the private owner were completely disregarded. It could be argued that since common law principles established the existence of the state's right, the private owner took the title to public trust lands subject to the understanding that conveyances could be voided in the future. This argument is much more persuasive when used to justify exercise of the public's peculiar dominion (*jus publicum*) in the tidelands than when used to invalidate a conveyance to a private person.

> It [the existence of public trust easements] is a fact which they [the purchasers of tidelands] may be expected to weigh when purchasing such lands for development, and, when the state exercises its long-held rights in such lands, it has hardly frustrated the justifiable expectations of their owners. Nor does it seem reasonable for owners to complain that public trust rights in their lands have largely lain dormant for many years. If common law principles within the state established the existence of such rights, then owners took public trust lands subject to the understanding that they were liable to be regulated at a future date.[80]

The California Supreme Court, when faced with the question of whether to invalidate a private owner's title to tidelands or to impose public trust easements on his title, stated:

> [T]he buyer of land, under these statutes receives title to the soil, the jus privatum, subject to the public right of navigation, and in subordination to the right of the state to take possession and use and improve it for that purpose, as it may deem necessary. In this way the public right will be preserved, and the private right of the purchaser will be given as full effect as the public interests will permit.[81]

The *International Paper* court, relying on *Treuting*, held that the "changing characteristics of the land [from tidelands to fast dry lands] did not displace the trust imposed upon the State for the public."[82] Once the tidelands became fast dry lands, however, they were like other fast

---

[79] Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892).

[80] Note, *State and Local Wetlands Regulation: The Problem of Taking Without Just Compensation*, 58 VA. L. REV. 876, 895 (1972) (footnotes omitted).

[81] People v. California Fish Co., 166 Cal. 576, 138 P. 79, 87 (1913). More public trust easements have been added to California's public trust doctrine although navigation is still the primary public right. *See, e.g.*, Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

[82] 271 So. 2d at 399.

dry lands, inland or coastal, owned by the state and, therefore, should have been subject to conveyance to private persons for public or private purposes.

> [T]he exposed land involved here is no longer, as described in *Shively* "incapable of ordinary and private occupation . . . [whose] primary uses are public in their nature, for highways of navigation . . . ." [W]hen the water receded from the land, there was no longer a public benefit to be protected . . . .[83]

Carried to the logical, but absurd, extreme, this once-public-trust, always-public-trust holding would invalidate all littoral owners' title to the accretions to their lands.[84] Even though the court apparently limited this part of the holding to accreted lands which are not contiguous to private property,[85] the public trust doctrine should not be applied in situations involving fast dry lands. Since the justification for the imposition of the trust no longer exists, the trust in fast dry lands should be extinguished.

III. Specific Characteristics of the Public Trust

A. Public and Private Rights in the Coastal Zone

Various rationales have been suggested for the public trust doctrine.

> The approach with the greatest historical support holds that certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than serfs.[86]

---

[83] Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 322-23 (1973). In *Bonelli*, land abutting the Colorado River was conveyed by *federal patent* to a railroad company. Arizona succeeded the federal government to the title to the beds of navigable waters within the state. The land conveyed was gradually eroded so that title was mechanically transferred to the state as part of the riverbed. In 1955, the cattle company acquired title to the railroad grant. By that time most of that grant was covered by water and, therefore, subject to state ownership. As a result of a federal rechanneling project, the land in question became fast dry lands. The cattle company filed suit to quiet title. The Court held that title to the land, under applicable federal common law, was vested in the cattle company as riparian owner. The Court treated the surfacingof the land as an accretion.

> [84] Another littoral right is the right to accretions accumulated along the shore over submerged lands. So it is manifest that the State's ownership of the bottoms of the submerged lands is essentially ownership of the bottoms as bottoms . . . .

Harrison County v. Guice, 244 Miss. 95, 107, 140 So. 2d 838, 842 (1962) (littoral owners held to have the right to accretions due to artificial conditions created by a stranger). *But see* United States v. Harrison County, 399 F.2d 485 (5th Cir. 1968).

[85] 271 So. 2d at 399.

[86] Sax, *supra* note 36, at 484.

In order to protect these interests no individual or group should control them. These "intrinsically important" interests are inherent in the nature of the coastal zone. The land is unique, being submerged at least part of the time and constituting part of a public waterway from which a private owner cannot exclude the public. Traditional public rights in this unique zone include fishing and navigation, which became protected rights through substantial public demand over centuries during which fishing and navigation were the only uses that could be made of submerged lands.[87] More recently, demand for access to the sea has been expanded by recreation and industry. Clearly, the law must change as the public need changes; the public trust doctrine is sufficiently flexible to encompass such change.[88]

The most widely accepted approach to protection of public rights through use of the public trust doctrine is to reserve particular rights in the public and correspondingly limit the prerogatives of private ownership, effectively creating public easements over state-owned and privately held tidelands. This approach obviates expropriations of private land by the courts which would be unfair or even impossible; furthermore, easements are more flexible than fee interests because they can be described in terms of activities, not acreage; finally, by allowing private ownership, the state avoids much unnecessary regulation and maintenance expense.[89]

The principal objects of public trust protection are navigation, ports (including right of access to load and unload), free passage, commerce, fishing, sand and stones, seaweed and shells, recreation, conservation and aesthetics, and the "public interests." Of these, navigation and fishery are the oldest and most important. Citizens have the right of passage over private foreshore when necessary to exercise some other protected right, particularly fishing or navigation. The right of commerce is sometimes mentioned as an ancient right, and includes navigation, but could conceivably be expanded to other meanings in view of the booming tourist industry. The right to take sand, gravel, shellfish, and seaweed belongs to the public if the tideland has not been granted to private persons.

In the English case of *Blundell v. Catterall*,[90] the court held that the

---

[87] *See generally* Bohn v. Albertson, 107 Cal. App. 2d 738, 238 P.2d 128, 137-40 (Dist. Ct. App. 1951).

[88] *See* 1 R. CLARK, *supra* note 13, §§ 36.4(B)-37.2(C).

[89] Comment, *supra* note 5, at 769-70.

[90] 106 Eng. Rep. 1190 (K.B. 1821).

public had no right to stroll, bathe, or linger on the shore, but could use privately owned tidelands for passage or access to the ocean for fishing purposes. In the United States, the public has a right of passage along the foreshore, and public rights have been expanded in some jurisdictions to include such recreational activities as camping and hunting. Recreational interests such as bathing have not been recognized in all jurisdictions, but increased public demand in this country has caused considerable pressure to reverse the lingering effects of *Blundell*. The traditional public trust easements of navigation, commerce, and fisheries have been held to include hunting, bathing, swimming, boating, and general recreational pursuits.[91]

Preservation of natural resources has been held to be encompassed by free navigation and fisheries.[92] In the 1971 case of *Marks v. Whitney*,[93] the court recognized that

> [t]here is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.[94]

The broad "public interest" concept can be expanded to embrace any valid public interest deserving protection just as the public determined that fishing and navigation deserved protection 500 years ago when the waterways were susceptible to only these uses.[95]

> The public today stands in danger of losing access to beaches entirely in many places. Yet, quieting title . . . in the state will not solve the access problem. Nor will quieting title in the upland owner result in any loss of public rights in the foreshore or beach which the public always has a right to use. The foreshore between the mean high and low tide lines is public property.[96]

In general, the public has no right to cross private property to reach

---

[91] Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971). *See also* United States v. Harrison County, 399 F.2d 485, 491 (5th Cir. 1968); Treuting v. Bridge & Park Comm'n, 199 So. 2d 627 (Miss. 1967).

[92] Comment, *supra* note 5, at 786.

[93] 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

[94] *Id.* at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796.

[95] Nelson, *supra* note 43, at 496-97.

[96] Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So. 2d 209, 213 (Fla. Dist. Ct. App. 1973).

navigable waters.[97] The state, however, exercising its power of eminent domain,[98] can condemn an access easement across private property for the public if there is no other reasonable access to the beaches and coastal waters.

Riparian owners, as members of the public, enjoy the same rights in public trust lands as does the public, as well as additional rights respecting waters adjacent to their land. The most important of these riparian rights is the right of access—the right to remain in contact with the water, embodying the qualified, common law right to wharf out to navigable waters, and the right to accretion.[99] The right of access to the adjacent waters is a substantial property right, usually considered an element of value in purchase. "When the land conveyed is bounded by water, it may well be regarded as the expectancy of both grantor and grantee that it should continue to be so bounded."[100] The doctrines of accretion, reliction, avulsion, and erosion are designed to protect this expectation.[101] When the bed and channel of a body of water are changed by natural, "imperceptible" accretion or erosion, the stream continues to be the boundary. By the great weight of authority, title to accreted lands vests in the riparian owners of abutting lands and the title to

---

[97] *Id.* at 214.

[98] *See* Comment, *Mississippi Eminent Domain Law*, 44 MISS. L.J. 692 (1973).

[99] "[T]he rights of riparian owners are subject to the prior right of the State to impose an additional public use upon the [public trust] lands without requiring the payment of additional compensation." Xidis v. City of Gulfport, 221 Miss. 79, 90, 72 So. 2d 153, 158 (1954). *But see* Hayes v. Bowman, 91 So. 2d 795 (Fla. 1957). Littoral rights are appurtenances to private property and as such are entitled to due recognition and protection. *Id.* at 798-99. *See generally* 1 H. FARNHAM, *supra* note 6, §§ 62-75; Note, *Artificial Additions to Riparian Land: Extending the Doctrine of Accretion*, 14 ARIZ. L. REV. 315 (1972). *See also* Crary v. State Highway Comm'n, 219 Miss. 284, 68 So. 2d 468 (1953).

[100] 3 AMERICAN LAW OF PROPERTY § 15.27, at 857 (A. J. Casner ed. 1952) [hereinafter cited as Casner].

[101] *Accretions* or *accreted lands* are additions to the area of realty from gradual deposit by water of solid materials, whether mud, sand, or sediment, producing dry land which before was covered by water . . . .

Reliction is the term applied to land that has been covered by water, but which has been uncovered by the imperceptible recession of the water.

Accretion as a general term. Technically speaking, land uncovered by a gradual subsidence of water is not an accretion but a reliction, but the terms are often used interchangeably, and law relating to accretions applies in all its features to relictions.

Avulsion is the sudden change of the banks of a stream such as occurs when a river forms a new course by going through a bend . . . .

Erosion is the gradual and imperceptible wearing away of land (bordering on a body of water) by the natural action of the elements . . . .

Id. § 15.26, at 855-56.

eroded lands (land that has become submerged) vests in the state.[102] Where land is subject to the ebb and flow of the tide, it is generally subject to the public trust, and as such is owned by the state as trustee for the benefit of the public. Submerged land not subject to the ebb and flow of the tide is owned to its center by the adjacent riparian owner.[103] This rule assures that the riparian owner will not lose the access to water which is often the most valuable feature of his property. Accreted land does not belong to the riparian owner, however, where the owner causes the accretion.[104] Since land below the ordinary high water mark belongs to the state in its capacity as trustee of the public trust, to allow the riparian owner to reclaim this land as his own would be "tantamount to allowing him to take state land."[105] Where the accretion is caused by artificial means over which the riparian owner has no control, however, most courts have treated the artificial accretion in the same manner as natural accretion, vesting title in the riparian owner.[106]

Where the change in the banks of a body of water is not gradual

---

[102] The discussion of riparian rights in connection with the public trust doctrine is limited to bodies of water which are subject to the ebb and flow of the tide. The term "riparian" is used even though the term "littoral" would be more correct.

[103] State *ex rel.* Rice v. Stewart, 184 Miss. 202, 223, 184 So. 44, 47 (1938). Since this comment deals only with public and private rights in public trust lands, conflicts in ownership discussed herein will generally be between a riparian owner and the state.

[104] State v. Sause, 217 Ore. 52, 342 P.2d 803 (1959); Lakefront Trust, Inc. v. City of Port Arthur, 505 S.W.2d 606, 608 (Tex. Civ. App. 1974).

[105] Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So. 2d 209, 212 (Fla. Dist. Ct. App. 1973). The leading case for the proposition that a riparian owner cannot obtain title to submerged lands by filling is Barney v. Keokuk, 94 U.S. 324 (1876).

[106] St. Clair County v. Lovingston, 90 U.S. (23 Wall.) 46 (1874); Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So. 2d 209 (Fla. Dist. Ct. App. 1973). *Compare* Harrison County v. Guice, 244 Miss. 95, 140 So. 2d 838 (1962) (riparian owner held to be vested with title in beach resulting from artificial accretion), *with* United States v. Harrison County, 399 F.2d 485 (5th Cir. 1968) (court held that the common law doctrine of artificial accretion which was followed in *Guice* must yield to section 95 of the Mississippi constitution of 1890, which provides that the state shall not donate its lands, directly or indirectly, to individuals). *United States v. Harrison County* is clouded with racial overtones and by the fact that the federal aid for the construction of the artificial beach was subject to an agreement by the state to assure the perpetual public use of the beach. Only a strained reading of section 95 like the one in *United States v. Harrison County* would have any bearing on the common law doctrine of artificial accretion. It is suggested that section 95 does not abrogate the common law doctrine of artificial accretion in Mississippi. When the accretion is the result of a lawful exercise of the police power, the riparian owner should become the owner of the accreted lands. For a discussion of the reasons for the doctrine of accretion, see Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So. 2d 209, 212-13 (Fla. Dist. Ct. App. 1973). For a discussion of the contrary view, that the source of the artificial change is immaterial and the riparian owner is not vested with title in artificially accreted lands, see State v. Sause, 217 Ore. 52, 342 P.2d 803, 803-28 (1959).

and "imperceptible" but is due to the sudden action of the elements and perceptible while in progress (avulsion), the boundaries between the riparian owner and the state do not change, and title to the land will continue in the previous owner.[107] Presumably, since the definition of avulsion assumes that the sudden change is caused by action of the elements (usually water), the doctrine of avulsion (no change in title occurs) has no application to sudden changes which are caused by artificial means. As noted above, a riparian owner cannot acquire title to submerged lands by artificially filling them.[108] There is very little authority, however, dealing with artificial change resulting in inundation of a portion of the riparian owner's land. Two questions are raised: Does the state become the owner of the newly submerged lands, thereby divesting the riparian owner's title? If not, does the public acquire public trust rights in these waters; that is, does the riparian owner's *jus privatum* become subject to the *jus publicum*? In *Bohn v. Albertson*,[109] the riparian owner's land was inundated by sudden, natural causes. The court held that where a portion of a riparian owner's land is suddenly engulfed, the owner is not divested of his title to the submerged lands if the former boundary can be determined or the land reclaimed within a reasonable time.[110] The real question, according to the court, was not title to the submerged lands, but whether by the flooding the public acquired free navigation and fishing rights in the flooded lands. The court, in qualifying its holding, said that "although the title to the lands thereunder still remains in the owners and they have the right to reclaim, the public, until the land is reclaimed, has the right of navigation and fishery."[111] Whether the public will acquire any rights in waters which have been inundated by artificial means, such as channeling, may depend upon the degree of state involvement in the artificial change. If the change, which will generally be the result of dredging, is made by the landowner pursuant to a state permit, which will usually be required if coastal wetlands are altered,[112] the state may be able to impose the *jus publicum* on the submerged lands as a condition for granting the permit. If the state takes a portion of a riparian owner's property, either

---

[107] Bohn v. Albertson, 107 Cal. App. 2d 738, 238 P.2d 128, 135 (Dist. Ct. App. 1951). *Contra*, Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973) (applying federal common law). *See also* Casner, *supra* note 100, §§ 15.26, 15.29. There is a presumption in favor of accretion rather than avulsion. Municipal Liquidators, Inc. v. Tench, 153 So. 2d 728 (Fla. Dist. Ct. App. 1963); Casner, *supra* note 100, § 15.29.

[108] United States v. Turner, 175 F.2d 644, 647 (5th Cir.), *cert. denied*, 338 U.S. 851 (1949).

[109] 107 Cal. App. 2d 738, 238 P.2d 128 (Dist. Ct. App. 1951).

[110] 238 P.2d at 136, *citing* 1 H. FARNHAM, *supra* note 6, § 74.

[111] 238 P.2d at 135.

[112] *See* MISS. CODE ANN. § 49-27-9 (Supp. 1973).

in fee simple or by easement, and dredges a canal in the valid exercise of its police powers, the public will generally have the right to use the waters of the canal. Where no permit is required and the dredging is done solely by the riparian owner, the public may not acquire any rights in the submerged lands. This statement is based, by analogy, on the general rule regarding the rendering of nonnavigable waters navigable by dredging.

> As a general proposition, the proprietor of a non-navigable stream or body of water neither loses any of his own rights therein nor subjects it to any public servitude by rendering it navigable by artificial means.[113]

As to the question of whether the state becomes the owner of lands submerged by artificial means, one court has held that as long as the riparian owner does not encroach on the rights of the state and the public in general he may cause a sudden recession of his bank which will neither destroy his title nor affect his boundary.[114]

> Whether we call it an "avulsion" or simply set down the rule that a riparian owner does not change his boundary when he makes a use of his land which results in a sudden recession of his bank as corollary of the rule that he cannot add to his land by suddenly filling out from the bank, we are satisfied that any area which now exists at the defendants' log dump which is covered and uncovered by the tides is not the property of the state.[115]

The *Albertson* decision appears correct in concluding that the important question concerns, not title to the artificially submerged lands, but the extent of the public's rights to use the waters which cover the land. A recession, caused by either natural or artificial means, should not operate to divest the riparian owner of title to the newly submerged lands. Any argument in favor of vesting title in the state will be based on the fact that the public automatically acquires rights in lands which become subject to the public trust, whereas there is some doubt about the extent of the public's rights, if any, in artificially created submerged lands which are privately owned.

A balancing of public and private rights is required which should not result in divesting the riparian owner of his title. Divesting the riparian owner of title is inequitable and inconsistent with the protection that is generally afforded private property rights. If alteration by

---

[113] 56 AM. JUR. *Waters* § 211 (1947); *accord*, Clement v. Watson, 63 Fla. 109, 58 So. 25, 27 (1912); Ilhenny v. Broussard, 172 La. 895, 135 So. 669 (1931). *Contra*, People v. Kraemer, 7 Misc. 2d 373, 164 N.Y.S.2d 423 (Village of Lloyd Harbor Police Ct. 1957). *See also* Comment, *supra* note 59, at 232; 8 TEXAS L. REV. 604 (1930).

[114] State v. Sause, 217 Ore. 52, 342 P.2d 803 (1959).

[115] 342 P.2d at 827-28.

the riparian owner encroaches on the rights of the state or unreasonably interferes with the public's use of the body of water, then the state could require that the bank be restored to its former condition or impose the public servitudes (public trust easements) on the newly submerged land. Whether the public should be entitled to any form of servitude in the water which covers the newly submerged land where no encroachment or interference has occurred presents a different question. Riparian owners should be allowed to make reasonable use of their property without having public servitudes placed upon it or losing title to their property where the use does not have an adverse effect on coastal wetlands or unreasonably interfere with the exercise of public rights in public trust lands.[116]

B. Standing to Enforce the Public Trust

May any member of the public bring an action to enforce his public trust rights? In general, standing in state courts has been found where there has been injury in fact.[117] Interference with the public's rights—the *jus publicum*—constitutes an interference with rights common to each member of the general public, and has been held by some state courts to create a public nuisance.[118] In those states, generally speaking, only littoral owners who have suffered unique injury in fact would have standing to enforce the public trust.

> [I]t is uniformly held that a private individual has no action for the invasion of the purely public right unless his damage is in some way to be distinguished from that sustained by other members of the general public. It is not enough that he suffers the same inconvenience . . . as everyone else. Redress of the wrong to the community must be left to its appointed representatives. The best reason that has been given for the rule is that it relieves the defendant of the multiplicity of actions . . . .[119]

A littoral owner has a right in adjacent tidelands separate and distinct from that of the general public. Subject to the public trust

---

[116] *See* 8 TEXAS L. REV. 604 (1930). For a discussion of the public's right to use navigable waters, see 1 R. CLARK, *supra* note 13, § 37; Note, *Waters and Watercourses—Rights of the Public in Navigable Waters*, 42 MISS. L.J. 270 (1971).

For a discussion of the doctrine of prior appropriation, which is beyond the scope of this comment, see Champion, *Prior Appropriation in Mississippi—A Statutory Analysis*, 39 MISS. L.J. 1 (1967); Comment, *Mississippi Water Conservation Law*, 28 MISS. L.J. 190 (1957).

[117] *See* K. DAVIS, ADMINISTRATIVE LAW TEXT § 22.06 (3d ed. 1972).

[118] Nelson, *supra* note 43, at 503.

[119] W. PROSSER, THE LAW OF TORTS § 88, at 586-87 (4th ed. 1971); J. GOULD, *supra* note 12, at 46. *See generally* 1 H. FARNHAM, *supra* note 6, §§ 443-54.

servitude, the littoral owner generally has a right to build a pier out to the line of navigability,[120] a right to accretion,[121] and a right to access.[122] A littoral owner can seek an injunction, under nuisance law, against interference by a private person with these rights.[123] But suppose a private party violates the public trust without causing injury to a littoral owner. The state has standing to enforce the public trust as trustee through its attorney general,[124] but the attorney general, in the exercise of his discretion (similar to that enjoyed by prosecutors), can determine that the public interest is not infringed upon and decline to enforce the public trust. Should a member of the public be deprived of public trust rights without an opportunity to be heard? Redress from the legislature, if obtained at all, often would come too late to be effective. The public nuisance theory does not fit the public trust situation; the public is not entitled to separate, individual damages for a violation of public trust rights. A multiplicity of suits would not result since the only recovery would be that in favor of the state as representative of the people and trustee of the public trust rights.

The Mississippi Supreme Court apparently has adopted a broad view of standing to enforce the public trust, despite language to the contrary in *Money v. Wood*.[125] In *Money*, the court granted standing to a littoral owner who had suffered injury in fact. Apparently, the court was faced with an argument based upon the public nuisance theory.

> [T]he complainant had the power and the right in this suit to attack the validity of the conveyances; and his rights were so affected by the proposed improvement. He had the right to prevent injury to his enjoyment of his property, and was not merely one of the many citizens undertaking to exercise a right on behalf of the state . . . .[126]

In *State ex rel. Rice v. Stewart*,[127] the court said:

> Regarding the contention of appellees that the state land commissioner, and not the attorney general, is vested with the statutory authority to bring a suit of this character, we find nothing in the statutes conferring jurisdiction on such officer over tide-water lands. . . . On

---

[120] 1 R. CLARK, *supra* note 13, § 43, at 273; Note, 7 SAN DIEGO L. REV. 684 (1970).

[121] Harrison County v. Guice, 244 Miss. 95, 107, 140 So. 2d 838, 842 (1962).

[122] *Id.*; 1 R. CLARK, *supra* note 13, § 43, at 273; *see* text accompanying notes 96 through 116 *supra*.

[123] *See generally* W. PROSSER, *supra* note 119, § 89.

[124] State *ex rel.* Rice v. Stewart, 184 Miss. 202, 222, 184 So. 44, 46 (1938).

[125] 152 Miss. 17, 118 So. 357 (1928).

[126] *Id.* at 31-32, 118 So. at 360. The Mississippi Code grants standing to any citizen of the county where the nuisance exists to bring an action in the name of the state to abate the public nuisances of prostitution and lewdness. MISS. CODE ANN. §§ 95-3-1, -5 (1972).

[127] 184 Miss. 202, 184 So. 44 (1938).

> the other hand, the attorney general is vested with both statutory and common law authority to represent the sovereign in the enforcement of its laws and protection of public rights.[128]

Clearly the attorney general has standing to enforce the public trust, but he may decline to do so in his discretion. *Parks v. Simpson*[129] appears to provide the answer, with *Treuting v. Bridge & Park Commission*[130] lending support. In *Parks*,

> [i]t was alleged that Parks is a resident citizen and taxpayer of Harrison County; that he filed this action for himself, the general public, and all persons interested; and that he expressly invited such persons to join in the litigation. It was further alleged that, prior to instituting the action, he solicited both the Attorney General of the State and the District Attorney of the Second Judicial District of Mississippi to bring the suit or permit the same to be brought in their names, but that said officers declined to do either.[131]

In *Treuting*, a taxpayer was allowed to intervene as a defendant with the state.[132] Thus, a taxpaying member of the public apparently has standing to enforce the public trust in Mississippi, regardless of whether he has suffered an injury that can be "distinguished from that sustained by other members of the general public." As a beneficiary of the public trust, a member of the general public should be granted standing to protect public trust rights. Violations of the public's rights in the public trust lands are nuisances which may be challenged by the state or affected citizens.[133]

C. Remedies

As noted above, the state has a duty to see that interference with the public trust rights is abated, and that, when possible, the damaged waters and lands be restored to their prior condition. "Violations of the public's rights in the foreshore are nuisances that can be challenged by the State and/or affected citizens and are subject to damages, injunction, and/or (especially) abatement."[134]

In a 1973 decision, *State v. Jersey Central Power & Light Co.*,[135] a

---

[128] *Id.* at 222, 184 So. at 46.

[129] 242 Miss. 894, 137 So. 2d 136 (1962).

[130] 199 So. 2d 627 (Miss. 1967).

[131] 242 Miss. at 898, 137 So. 2d at 136.

[132] 199 So. 2d at 629.

[133] Comment, *supra* note 5, at 788.

[134] *Id.*

[135] 125 N.J. Super. 97, 308 A.2d 671 (L. Div. 1973), *noted in* 5 SETON HALL L. REV. 394 (1974).

New Jersey superior court held that the state has a right and a fiduciary duty to collect damages for the destruction of wildlife which is a part of the public trust. In *Jersey Central* a nuclear power plant used a process to produce electricity which resulted in many fish dying from thermal shock. The court noted that the fish were clearly within the corpus of the public trust. The power company contended that the state had a right only to injunctive relief in such a situation; because the state lacked a proprietary interest in the fish, the state could not collect damages for their destruction.[136] The court rejected this argument, holding that a sovereign interest alone would support a claim for damages.[137]

In *State ex rel. Rice v. Stewart*,[138] a 1938 Mississippi case, the court noted that the state has statutory authority to bring all actions and have all remedies to which individuals are entitled,[139] and that section 280 of the *Restatement of the Law of Trusts* declared that a trustee could maintain the same actions at law or suits in equity against third parties as if the property were held free of any trust. After discussing several decisions in other states, the court stated:

> In fact, it is generally recognized that the taking of ore, sand and gravel and other minerals from the bed of a stream by individuals or corporations for commercial purposes is incompatible with the absolute title of the state therein as trustee for the public. The state's right to recover the value of such deposits so taken has been upheld wherever the question has arisen except in the case of State v. Korrer, 127 Minn. 60, 148 N. W. 617 . . . .[140]

The court concluded that since the state was allowed to recover damages for trespass on "sixteenth section" land, by analogy it could also recover damages for the sand and gravel that had been extracted from public trust lands.[141]

---

[136] 308 A.2d at 673-74.

[137] For a discussion of the proprietary and sovereign interests, see notes 74 & 75 and accompanying text *supra*; Fraser, *supra* note 74.

[138] 184 Miss. 202, 184 So. 44 (1938). The case is discussed at text accompanying notes 57 through 62 *supra*.

[139] 184 Miss. at 231, 184 So. at 50.

[140] *Id.* at 233, 184 So. at 51. *Korrer* has been criticized as the "logical, but absurd result of the doctrine" which existed in Minnesota at that time. Fraser, *supra* note 74, at 446. In *Korrer* the court held that the riparian owner could not take iron ore from the bed of public waters because the state held the land in trust for the benefit of the people of the state, and that the state could not recover the minerals since the state owned the "soil under the public waters in a sovereign, not a proprietary, capacity." State v. Korrer, 127 Minn. 60, 148 N.W. 617, 622 (1914).

[141] 184 Miss. at 235, 184 So. at 51. The measure of damages for willful trespass was said to be the actual value of the property taken without allowance of deductions for labor or other expenses incurred in the dredging of the sand and gravel. However, if the trespass resulted from an honest mistake, deductions for the cost of production would be allowed. *Id.* at 235, 184 So. at 51-52.

Although most of the decisions of the Mississippi Supreme Court have declared deeds to private persons for private purposes null and void or have dealt with littoral rights and not specifically with the remedies available to the state when the public right in public trust lands has been interfered with,[142] it is clear that the state is entitled to the normal remedies of damages, injunction, and abatement.[143]

IV. New Directions

A. Common Law Public Trust Doctrine

In *International Paper*, the Mississippi Supreme Court, applying the Mississippi public trust doctrine, held that Lowry Island, considered private property since 1884, was still state property. The possible ramifications of this decision are staggering. Numerous individual property owners could be affected if the state chooses to claim title to their land on the basis of *International Paper*. Development in the coastal area could come to an abrupt halt; even though the land in question is now fast dry land, it belongs to the state if it was subject to the ebb and flow of the tide at the time of the original conveyance from the state and that conveyance was to a private person for private purposes.[144] *International Paper* went one step further and held that accreted lands not contiguous to private property (hopefully *International Paper* can be limited in this manner) belong to the state even though these lands were fast dry lands at the time of the conveyance. *International Paper* has left individual property owners wondering whether they own the land upon which they have been paying taxes and perhaps making valuable improvements. The decision departs from the common law doctrine which was purportedly adopted in Mississippi[145] by placing too much emphasis on state title and ownership. A mechanical application of this decision will result in injustice to long-time, apparent owners. This emphasis is unnecessary. Regardless of whose lands underlie tidal waters, the usual public trust concept subjects the property to the public rights of navigation and fishing, and under the majority of modern decisions, hunting, boating, swimming, and other related uses.[146] If the tideland is under water that is navigable, it is also subject to the navigational servitude

---

[142] *See, e.g.*, International Paper Co. v. Mississippi State Highway Dep't, 271 So. 2d 395 (Miss. 1972), *cert. denied*, 414 U.S. 827 (1973); Money v. Wood, 152 Miss. 17, 118 So. 357 (1928).

[143] State *ex rel.* Rice v. Stewart, 184 Miss. 202, 184 So. 44 (1938).

[144] International Paper Co. v. Mississippi State Highway Dep't, 271 So. 2d 395, 398 (Miss. 1972), *cert. denied*, 414 U.S. 827 (1973).

[145] *See* Miss. Code Ann. § 49-15-5 (1972). Mississippi's public trust statute clearly contemplates alienation to private persons. *See* note 49 *supra*.

[146] *See* 1 R. Clark, *supra* note 13, § 36.4(A).

of the United States.[147] Mississippi should return to this American common law public trust doctrine.

> The generally recognized rule is that the states own these lands [tidelands] subject to the public trust, or subject to the jus publicum, and that any conveyance by the state is subject to the same burden . . . . The power of a state to grant an interest to private owners is generally upheld, so long as the interests of the public are safeguarded or promoted by the purposes of the grant.[148]

Even this general rule, however,when followed mechanically, might result in injustice to long-time, apparent owners, and could impede needed development of the coastal zone. Where the *jus privatum* has been validly conveyed there may be no substantial public interest to be protected by mechanically holding that the alienated public trust land is subject to the *jus publicum*, as, for example, when the waters and submerged lands in question are incapable of public use due to either the physical characteristics or location of the land. The state should have the power to alienate both the *jus privatum* and *jus publicum* when consistent with the public's interest and without adversely affecting the public rights in the land and water remaining.[149] The public trust doctrine together with appropriate zoning and other land-use regulations and restrictions, can be used to prevent undesirable development in the coastal zone. At the same time, however, the public trust doctrine should be consistent with these regulations so that desirable development will not be impeded. This is not to suggest that alienation of both the *jus privatum* and the *jus publicum* should be the rule rather than the exception. It clearly should be the exception and allowed only when the legislation providing for such a conveyance strongly indicates that the public interest was actively considered. What constitutes the public interest is a legislative question, because the legislature is elected to represent the ultimate sovereign, the people. "The questions raised are inevitably political in nature, and should be subjected to the political process."[150] This is a job best left to the legislature; however, the public trust rights take precedence over other claims to the use of coastal resources, and it is the "court's duty to enforce and administer this priority."[151] When reviewing a particular questioned conveyance the

---

[147] State *ex rel.* Rice v. Stewart, 184 Miss. 202, 222, 184 So. 44, 49 (1938).

[148] 1 R. CLARK, *supra* note 13, § 36.4(A), at 197.

[149] *See* text accompanying note 43 *supra. See also* MISS. CONST. art. 8, § 211; MISS. CODE ANN. § 29-3-61 (1972).

[150] Nelson, *supra* note 43, at 511.

[151] Comment, *supra* note 5, at 786-87. *See* Sax, *supra* note 36 (particularly pages 553-56 in which the "effective judicial intervention" in Parks v. Simpson, 242 Miss. 894, 137 So. 2d 136 (1962), is discussed).

court should inquire into the consideration of the public interest, well beyond the fact of the conveyance or a mere statement in the legislation that the interest of the public is being served. The legislature should erect an administrative framework[152] encompassing public hearings to determine the true public interest.[153] The public has a right to know what interests are being considered in dealing with public lands held in trust. Public hearings will serve this right and would give the public a voice in the considerations.[154] The administrative proceeding should directly address the question whether the tidelands in question should be preserved for free use by the general public for navigation, fishing, and swimming. If, after thorough consideration, the legislature determines that the public interest would best be served by conveying the tidelands to a private owner for stated purposes (probably primarily residential and commercial development), then the public trust could be extinguished, alienating both *jus privatum* and *jus publicum*. As indicated, the legislature should be slow to approve such a conveyance. If, on the other hand, the legislature determines that the public interest would best be served by preserving the free use of the tidelands and tidal waters by the general public for boating, fishing, and swimming, then the state should retain complete ownership of the tidelands in question.

The other, more difficult problem created by *International Paper* is injustice to long-time, apparent, private owners. The common law rule allowing alienation of the *jus privatum* subject to the *jus publicum* should be adopted, permitting the individual to retain ownership of the *jus privatum*. Adoption of this course will establish the necessary title certainty. The private owner could use the legislature's administrative

---

[152] For a discussion of a suggested administrative framework, see Comment, *supra* note 34, at 138-42. *See also* Richard, *supra* note 43, for a discussion of the Florida administrative framework. Both of the above-mentioned frameworks precede the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-64 (Supp. II, 1972). It is suggested that the coastal zone management agency which is set up pursuant to this Act be responsible for administering the public trust lands. Land use management is the key to an orderly development, as well as preservation and conservation, of the coastal zone. The public trust lands (which include the tidelands), as the single most important part of the coastal zone, should be included in any coastal zone management plan. The doctrine might also be expanded to prevent pollution of the water from land-based, as well as water-based, sources when the pollution directly impairs the public rights in public trust lands.

[153] Nelson, *supra* note 43, at 511.

[154] Mississippi Coastal Wetlands Protection Act, MISS. CODE ANN. § 49-27-15 (Supp. 1973), provides for a hearing when requested. However, notice of the hearing is required to be published in a "newspaper of general circulation in the county in which the affected wetlands are located." Since the wetlands are held in trust by the state for the benefit of all the people of the state the notice should be published in at least one newspaper of general publication in the state. Otherwise, the public interest may not be fully considered. For a discussion of the Act, see text accompanying notes 157 through 158 *infra*.

framework to determine whether his tideland should even be subject to the *jus publicum*. If it is determined that the tidelands in question should not be subject to the *jus publicum* (there should be a strong presumption that it is), then the public trust is extinguished; otherwise all tidelands, regardless of ownership, should be subject to the *jus publicum*.

This discussion of the public trust doctrine has been confined to public and private rights in waters and submerged lands, and to ownership of the soil in public trust lands. The corpus of the public trust, however, also includes dead reef shells, fish, oysters, and other sea foods.[155] The state holds these sea foods in trust for the common benefit of all the people of the state. This aspect of the public trust doctrine can be used to control pollution, from whatever source, which results in the destruction of the wildlife of any waters (particularly estuaries) which are subject to the ebb and flow of the tide.

The doctrine could also be used to protect the public interest in bathing, aesthetics, boating, and related public uses on which pollution has a direct, adverse effect. When pollution or other activity interferes with public exercise of public trust rights, the state has a duty to see that the interference is abated[156] and that the damaged rights are restored so far as possible.[157]

B. Statutory

Section 49-27-5(a) of the Mississippi Coastal Wetlands Protection Act provides that coastal wetlands include "all publicly owned lands subject to the ebb and flow of the tide and which are below the watermark of ordinary high tide . . . ." Section 49-27-3 of the Act sets forth the public policy of Mississippi with regard to the coastal wetlands:

> It is declared to be the public policy of this state to favor the preservation of the natural state of the coastal wetlands and their ecosystems and to prevent the despoliation and destruction of them *except* where a specific alteration of the specific coastal wetlands would serve a higher public interest in compliance with the public purposes of the public trust in which coastal wetlands are held. (Emphasis added.)

---

[155] Parks v. Simpson, 242 Miss. 894, 137 So. 2d 136 (1962); *see* MISS. CODE ANN. § 49-15-5 (1972); note 49 *supra*.

[156] The public trust doctrine, when used in this manner, is akin to public nuisance theory. The important difference lies in the fact that the state is trustee of the public rights under the public trust doctrine; whereas the rights infringed upon by a public nuisance are private, even though the general public may suffer the same damages.

[157] Mississippi Coastal Wetlands Protection Act, MISS. CODE ANN. § 49-27-55 (Supp. 1973). *See* text accompanying notes 134 through 143 *supra* for a discussion of the remedies available for the protection of the public trust rights.

Section 49-27-7, however, exempts so many activities from the Act's coverage that the effectiveness of the Act is doubtful at best.[158] As a result, the common law public trust doctrine, properly used, provides broader protection for the coastal wetlands than does the Act. Section 49-27-3 of the Act is an excellent restatement of the public trust policy which this comment has suggested should be adopted by the State of Mississippi. Finally, the Act applies only to publicly owned coastal wetlands, while the public trust doctrine contemplates all privately and publicly owned wetlands. Since the public trust doctrine provides greater protection to the coastal wetlands than does the Coastal Wetlands Protection Act, why was this act adopted? It could be argued that the Act was intended to codify the public trust doctrine and, in doing so, limited it. The declaration of public policy, however, does not support this argument. In the public policy statement, the public trust doctrine is a limitation on the exception to the public policy of preservation. The Act was probably intended as additional protection for the coastal wetlands due to the limited use that has been made of the public trust doctrine in Mississippi. The public trust doctrine can and should be used to provide the necessary protection for the coastal wetlands until the Act is amended to afford this protection. The Act does provide for an agency, the Mississippi Marine Resources Council, to administer the coastal wetlands. As previously suggested, the public trust lands and the public interests in these lands and waters cannot be adequately

---

[158] For a brief discussion of the effect of the many exceptions of section 49-27-7, see Abbott & Holmes, *A Survey of Federal and Mississippi Environmental Law with an Examination of Its Effect on Land Development*, 45 Miss. L.J. 821, 866-68 (1974).

It is the opinion of the Office of the Attorney General of Mississippi that section 49-27-7 requires those exempt from the permit requirement to keep the Mississippi Marine Resources Council advised of "all activities in which they engage in the wetlands which would otherwise be considered 'regulated activity' but which are associated with and necessary for the carrying out of the particular exempt activity." Letter from Mrs. Jean R. Richey, Special Assistant Attorney General, to Joel Blass, Oct. 30, 1974, copy on file at the *Mississippi Law Journal.* Mrs. Richey further states that those engaging in exempt activities must still adhere to the public policy stated in section 49-27-3. The Act clearly supports these statements. The question still remains: What happens when those engaging in exempt activities fail to adhere to section 49-27-3? Mrs. Richey concluded:

> The purpose of such advice, as required by Section 49-27-7, is so that the Council . . . may decide whether unnecessary alteration of wetlands is taking place by an exempt party, that is, to an extent greater than is required by the activity which the Legislature has decided is a "higher public interest." Whether the "exempt" authority is being exceeded then becomes a factual matter to be determined by the Council.

Mrs. Richey is of the opinion that an exempt activity may exceed its exemption and consequently lose the exemption to the extent that it is exceeded. The Act does not support her conclusion, but if she is correct the Act will be a much more effective coastal zone management tool.

protected unless an agency is created that is entrusted with the responsibility for this protection. Only such an agency can develop the expertise necessary to assure that the coastal zone is properly managed and developed.

CONCLUSION

The coastal zone, with its biological and mineral resources and recreational and aesthetic values, is not a limitless resource. It must be managed and used in a manner that will ensure that resources are not misallocated. Misallocation, caused chiefly by industrial and residential development pressures, has led to the destruction of many acres of the coastal wetlands. Both the general public and the private littoral owners have interests, which may conflict, in the preservation of many areas of the coastal zone. When these interests conflict, the courts must balance them to decide which should prevail in each area. A different balancing technique must be used, however, where the interests of the general public or a littoral owner conflict with industrial and other developmental pressures. While the courts may be equipped to handle the conflicts between the interests of the general public and littoral owners, they are not equipped to manage the development of the coastal zone.

> In the public trust doctrine, courts have a viable means of protecting the public's interest in the tidelands; however private litigation, by itself, is neither an adequate nor efficient means to manage the vast tidelands of the state; rather, a comprehensive program administered by a state board or agency is needed to control the tidelands resources.[159]
>
> What becomes most obvious is that the courts cannot administer our submerged lands. Neither should they declare what constitutes the public interest in navigable waters, for inevitably the parties before the court represent only a small portion of that interest.[160]

The courts have neither the expertise nor the resources to employ the economic, sociological, and political data necessary to reach the proper decision based upon long-range, comprehensive management and development objectives, policies, and goals. The courts' function should be appellate; an administrative agency should have primary responsibility for management and development of the coastal zone.

With regard to the public trust doctrine, the agency should be given the authority (1) to determine which public trust lands have been validly conveyed in fee to private parties, (2) to determine whether the public interest will best be served by imposing the public trust ease-

---

[159] 44 MISS. L.J. 322, 328 (1973).

[160] Nelson, *supra* note 43, at 511.

ments upon those lands which are found to be privately owned, (3) to determine whether public trust lands which are presently publicly owned should be conveyed to private owners, and, if so, the extent of the conveyance (*jus privatum* and/or *jus publicum*), and (4) to determine the extent and nature of the public trust easements that are imposed upon both publicly and privately owned public trust lands.[161]

> It is manifest that these rights do not constitute a closed set. The public determined the existence and nature of the rights in the first place. The fact that five hundred years ago the rights of the public were limited to navigation and fishing is generally explained by their being the only general uses to which the waterways were capable of being put. The *Jus Publicum* has increased as the customary public uses have increased.[162]

The nature and extent of the public's rights in public trust lands must change as the public interest and need changes. The Mississippi Coastal Wetlands Protection Act is a step in the right direction, but it is only the first step. When the Act is coupled with the police powers, the power of eminent domain, and the public trust doctrine, the coastal zone management agency will have the authority that it needs to *begin* to plan for the effective management and development of the coastal zone. Without the power to deal with the problems of the coastal zone, the agency cannot successfully allocate the resources of the coastal zone. Misallocation will lead to the destruction of many of Mississippi's coastal wetlands which may in turn irrevocably damage the interdependent ecosystems of the entire coastal zone. It is time for the legislature to act. Mississippi has too many independent, and often competing, boards, commissions, and agencies.[163] The problems of the coastal zone should be handled by one agency so that an overall, comprehensive program can be implemented without unnecessary interference and duplication.

Judith Jones Johnson
Charles Fremont Johnson III

---

[161] *See* Schoenbaum, *supra* note 2, at 23-30.

[162] Nelson, *supra* note 43, at 497.

[163] For a list of some of these governmental bodies, see Abbott & Holmes, *supra* note 158, at 855-56.

DIFFUSED SURFACE WATERS IN MISSISSIPPI

I. Introduction

Although the preponderance of water law has developed concerning the right *to* water, one category of water has consistently provided problems of an opposite nature. When water loses its identity as a body of water and scatters over the land surface, the problem normally becomes one of disposal rather than appropriation.[1] The drainage and disposal of such diffused "surface waters"[2] have caused increasing problems between private landowners, especially during the past 125 years,[3] and will continue to be a problem as our nation develops its land resources. As highways are built, agricultural lands are leveled and graded, and urban areas are developed and improved, the natural flow of diffused surface waters will be affected, possibly to the injury of the interests of nearby landowners. The landowner desiring to make an alteration affecting the natural flow of diffused surface waters will want to ascertain how extensive the alteration can be without incurring legal liability to surrounding landowners. The landowner who has been affected by a change in the flow of surface waters desires to know whether he has recourse against the landowner causing the change.[4] Thus, the primary interest of the landowner affecting the change is *predictability*; he wants to ascertain beforehand the cost of his intended improvement. The landowner whose interest has been affected adversely by the change is more interested in the *justice* aspect of the law; he wants a fair say as to what happens to

---

[1] *See* Maloney & Plager, *Diffused Surface Water: Scourge or Bounty?*, 8 Natural Resources J. 72, 73 (1968).

[2] *See* 3 H. Farnham, The Law of Waters and Water Rights § 878, at 2556 (1904). Diffused surface waters will be further defined in part II *infra*.

[3] *See* Kinyon & McClure, *Interferences with Surface Waters*, 24 Minn. L. Rev. 891 (1940).

[4] *See* 5 R. Beck & E. Clyde, Waters and Water Rights § 450.4 (R. Clark ed. 1972) [hereinafter cited as 5 Waters and Water Rights]. Professor Beck sets forth four fact situations where the landowner will be concerned with diffused surface waters:

> (1) Landowner *A* wants to improve his tract and in the process accelerate or otherwise alter the natural flow of water onto landowner *B*'s tract.
>
> (2) Landowner *A* wants to improve his tract and in the process drain water onto landowner *B*'s tract, a tract onto which the water does not drain naturally.
>
> (3) Landowner *A* wants to improve his tract and in the process impede the natural flow of water onto it from landowner *B*'s tract.
>
> (4) Landowner *A* wants to improve his land by draining a swamp that is located not only on a corner of his tract but partially on the tracts of landowners *B, C,* and *D* as well.

Id. § 450.2. Compare the list set out in 5 R. Powell, Real Property ¶ 729, at 435-36 (P. Rohan rev. ed. 1971).

his land. As if in direct response to these divergent interests, early American law developed two equally divergent rules of law pertaining to what is primarily a cost allocation problem.[5] First to appear was the "civil law" (or "natural flow") rule, formulated primarily in answer to the call for justice. The second rule, known as the "common enemy" rule, made the law highly predictable, but highly arbitrary. A third rule, the "reasonable use" rule, has developed more recently as an attempt to balance the interests of both types of landowners.

This comment will define and trace the development of the three rules of law pertaining to diffused surface waters as developed throughout the United States. The comment will consider the pertinent Mississippi law to determine which rule the Mississippi courts have followed. Throughout, the paper will compare Mississippi law with that of other jurisdictions, and, finally, will attempt to ascertain whether Mississippi's rule fairly meets the interests of both types of landowners and of the public in general.

II. Classification of Water

Despite the well-known fact that water is subject to the hydrologic cycle,[6] and thus in scientific theory is a single entity, the law continues to categorize water according to its "place of occurrence" in the hydrologic cycle,[7] or according to "the medium through which the harm is caused."[8] Since substantive rights may be determined according to the category of water involved in a particular case, classification is an important aspect of water law.

---

[5] Professor Kinyon points out:

> In each instance, one possessor of land sustains harm in the use and enjoyment of his land as a result, usually, of another's use and enjoyment of other land. The problem is one of reconciling conflicting uses of land, and the important question is whether circumstances exist which will justify a court in shifting [the] loss, or [a] part of it, from the person harmed to the person causing it.

Kinyon & McClure, *supra* note 3, at 891-92.

[6] 5 Waters and Water Rights § 450.2. The hydrologic cycle is the unending process in which water ascends from the seas into the atmosphere, moves over the land in clouds, descends to the land as rain, and flows naturally back to the sea, thus completing the cycle. 1 S. Ciriacy-Wantrup, W. Hutchins, C. Martz, S. Sato & A. Stone, Waters and Water Rights § 2.4 (R. Clark ed. 1967) [hereinafter cited as 1 Waters and Water Rights]. The scientific-cycle theory contemplates an "interrelated and interdependent" system of water. Hanks, *The Law of Water in New Jersey,* 22 Rutgers L. Rev. 621, 626 (1968).

[7] Hanks, *supra* note 6, at 626.

[8] Kinyon & McClure, *supra* note 3, at 892. This "unscientific" system of classification has brought criticism from some scientists who point out the "integral physical relation" between the legal classifications of water. One legal writer has summarized: "In short, the legal structure is neither as bad as its scientist-critics would make it, nor so perfect that it can ignore the latest scientific learning . . . ." Hanks, *supra* note 6, at 626-27.

The law of water may be divided into two broad categories: surface waters (those on the surface of the earth) and ground waters (those beneath the surface).[9] Courts generally subdivide surface waters into at least five categories: diffused surface waters, watercourses, floodwaters, lakes and ponds, and sloughs and swamps.[10] The primary classification to be made in a surface water disposition case, however, is whether the controversy involves the application of riparian or nonriparian rights. If riparian rights attach, then the law applicable to riparian land will be applied to the case; if riparian rights do not attach, then the law applied is usually that of diffused surface waters.[11] Riparian rights attach to land that borders on either a natural watercourse,[12] lake, pond,[13] or other natural body of water.[14] Riparian rights are those rights which attach to such land by virtue of the contiguity of the land to the body of water; they are considered natural and inherent to the ownership of such land, and arise by operation of law.[15] The riparian landowner is entitled to the "natural flow" of the watercourse flowing upon his land or may make "reasonable use" of natural flow of the water therein.[16] Since riparians are entitled to the use of their water, any dispute between two riparian landowners concerning the alteration of the flow of the body of water

---

[9] 1 WATERS AND WATER RIGHTS § 50, at 283, § 52.1(A), at 302. Not all waters technically "under the surface of the earth" may be classified as ground water. For example, those "under or immediately adjacent" to a surface stream will generally be classified as surface waters. *Id.* § 50, at 284-85.

[10] *Id.* § 52.1. Ground waters may be further categorized into underground streams, percolating waters, and rechargeable and nonrechargeable aquifers. *Id.* § 52.2.

[11] 3 H. FARNHAM, *supra* note 2, § 877.

[12] A watercourse "is a stream of water of such well-defined existence as to make its flow valuable to the owner of land along its course." *Id.* § 877, at 2556. It has further been defined as referring "to water flowing in a definite channel with a bed and banks or sides." 1 WATERS AND WATER RIGHTS § 52.1(B).

[13] "A pond or lake is a permanent body of water located on the surface of the earth, and having no current or other characteristic of a water course." 3 H. FARNHAM, *supra* note 2, § 878, at 2556.

[14] *Id.* § 878; 1 WATERS AND WATER RIGHTS § 51.1; Comment, *Mississippi Water Conservation Law,* 28 MISS. L. J. 190, 192 (1957). Sloughs and swamps are generally considered diffused surface waters. 3 H. FARNHAM, *supra* note 2, § 880, at 2562.

[15] Comment, *supra* note 14, at 192. *See, e.g.,* Ferris v. Wellborn, 64 Miss. 29, 34, 8 So. 165, 166 (1886); 3 H. FARNHAM, *supra* note 2, at § 877; 1 WATERS AND WATER RIGHTS § 51.1.

[16] Whether the riparian owner is entitled to the use of the water's "natural flow" (those waters flowing through his land undiminished in amount or quality) or to the "reasonable use" of such flow by the correlative or proportionate needs of other riparians on the same body of water depends upon the jurisdiction. Comment, *supra* note 14, at 191. For extensive discussions of riparian rights, see 6A AMERICAN LAW OF PROPERTY §§ 28.55-.60 (A.J. Casner ed. 1954); 5 R. POWELL, *supra* note 4, ¶¶ 710-20 (1971); 1 WATERS AND WATER RIGHTS § 51; Kalinski & Forste, *A Survey of New Hampshire Water Law,* 13 N.H.B.J. 3, 4-14 (1970); Comment, *supra* note 14, at 191-98, 217-22.

involved will be resolved in favor of the landowner challenging the alteration.[17] Thus, classification of the dispute as one involving the alteration of the waters of a watercourse, lake, or pond brings with it the application of riparian rights and will usually foreclose the controversy.

Most of the cases involving the determination of whether riparian rights attach involve waters which may be classified either as a watercourse or as diffused surface waters.[18] Professor Powell lists four characteristics of a watercourse: "(1) A definite channel; (2) A current of flow having substantiality; . . . (3) A definite source of supply; and (4) An outlet into another body of water."[19] Diffused surface water, on the other hand, has been defined as

> waters of a casual and vagrant character, which ooze through the soil, or diffuse or squander themselves over the surface, following no definite course. They are waters which, though customarily and naturally flowing in a known direction and course, have nevertheless no banks or channels in the soil, and include waters which are diffused over the surface of the ground, and are derived from rains and melting snows, occasional outbursts of water, which at times of freshet or melting snows descend from the mountains and inundate the country, and the moisture of wet, spongy, springy, or boggy ground.[20]

---

[17] 5 WATERS AND WATER RIGHTS, *supra* note 4, § 451.2(E), at 495.

[18] *See, e.g.*, Mississippi & T.R.R. v. Archibald, 67 Miss. 38, 7 So. 212 (1890).

> [O]nce this surface water has found its way to the beds of well-defined streams, and has joined their currents, it ceases to possess any of the qualities of surface water, and is regarded only as part and parcel of the volume that flows in the channels of the water-courses.

Id. at 46, 7 So. at 214. *See generally* Maloney & Plager, *supra* note 1, at 89. *See also* Weinberg v. Northern Alas. Dev. Corp., 384 P.2d 450 (Alas. 1963) (drainage ditch classified as a "drainway for surface waters" rather than a watercourse). Since diffused surface waters tend to flow in an established direction and "course" toward some watercourse or other body of water, the controversy often centers around the question of whether the "course" has sufficient characteristics of a watercourse to be classified as such.

[19] 5 R. POWELL, *supra* note 4, ¶ 710, at 351-52 (footnotes omitted). In Mississippi, a watercourse has been defined as "a natural channel . . . with defined bed and banks, . . . through which water is conveyed and discharged . . . ." Ferris v. Wellborn, 64 Miss. 29, 34, 8 So. 165, 166 (1886). It does not matter that the channel is dry for part of the year. *Id.* at 34, 8 So. at 166. In section 51-3-3(h) of the Mississippi Code Annotated of 1972, the following statutory definition of watercourse is given:

> Any natural lake, river, creek, cut, or other natural body of fresh water or channel having definite banks and bed with visible evidence of the flow or occurrence of water, except such lakes without outlet to which only one landowner is riparian.

This definition, however, appears in the code chapter concerning governmental regulation of state water resources, and may only be applicable within the context of that legislation. To the best of the authors' knowledge, the statute has not been mentioned in any case dealing with diffused surface waters and the classification problem of watercourse versus nonwatercourse.

[20] Brandenberg v. Zeigler, 62 S.C. 18, 39 S.E. 790 (1901). More concisely: "Diffused

Whether the source of the water is rain, melting snow, or a spring, when it is diffused over the surface of the ground it will be classified as diffused surface water and will retain that classification until it has reached "some well-defined channel in which it is accustomed to, and does, flow with other waters . . . ."[21] The primary consideration is whether the waters in question are unable to maintain their "identity and existence as a body of water."[22] Where the water in question forms a marsh, bog, or swamp, and evaporates and percolates, it has been held to be a nonuseful body of water and classified as diffused surface water;[23] if the water collects into a pond and does not maintain its existence for a reasonable amount of time, it will be treated as diffused surface waters.[24] That water merely diffuses sluggishly over the surface of the earth will not be sufficient reason for classification as diffused surface waters; if it retains sufficient force of flow to "maintain itself, and is subsequently gathered together as a channel so as to form a watercourse," it will be classified as such.[25] Floodwaters, to a certain extent, will be treated as part of the body of water from which they originated,[26] and riparian rights will attach if this is the case; however, if the floodwaters have lost connection with their source body of water, and have diffused and "settled in low places and [become] . . . stagnant," then they will be treated as diffused surface waters.[27]

III. History and Rationale of the Three Rules

Three basic substantive rules traditionally have been applied to the

---

surface waters are the uncollected flow from falling rain or melting snow, or are waters which rise in the earth from springs and diffuse over the surface of the earth." 1 WATERS AND WATER RIGHTS § 52.1(A), at 300; *e.g.*, Mississippi & T.R.R. v. Archibald, 67 Miss. 38, 46, 7 So. 212, 214 (1890). *See generally* Enderson v. Kelehan, 226 Minn. 163, 32 N.W.2d 286, 288-89 (1948); 3 H. FARNHAM, *supra* note 2, § 878; RESTATEMENT OF TORTS § 846 (1939); Hanks, *supra* note 6, at 687; Kalinski & Forste, *supra* note 16, at 14; Kinyon & McClure, *supra* note 3, at 891 n.1; Maloney & Plager, *supra* note 1, at 72; Comment, *supra* note 14, at 193 n.25. Mississippi has defined diffused surface waters as those of "casual and vagrant character . . . diffused over . . . land . . . ." Alcorn v. Sadler, 66 Miss. 221, 229, 5 So. 694, 695 (1889).

[21] 3 H. FARNHAM, *supra* note 2, § 878, at 2556; 1 WATERS AND WATER RIGHTS § 52.1(A), at 301.

[22] 3 H. FARNHAM, *supra* note 2, § 878, at 2557.

[23] *Id. See* text accompanying note 147 *infra*.

[24] *E.g.*, Brandenberg v. Zeigler, 62 S.C. 18, 39 S.E. 790 (1901).

[25] 3 H. FARNHAM, *supra* note 2, § 878, at 2556-57.

[26] *Id.* § 879, at 2559. As long as the floodwaters retain some force of flow and connection with the flooding body of water, they will be treated as part of that body of water. When the floodwaters become so severed from the stream as to be likely never to return, they will probably be treated then as diffused surface waters. 1 WATERS AND WATER RIGHTS § 52.1(C), at 314. Mississippi terms such floodwaters as *vagrant* floodwaters. *See* part V(D) *infra*.

[27] 3 H. FARNHAM, *supra* note 2, § 879, at 2559.

law of diffused surface waters: the civil-law or natural-flow rule, the common-enemy rule, and the reasonable-use rule.[28] The earliest of these rules, the natural-flow rule, in its most elementary form provides "that a person who interferes with the *natural* flow of surface waters so as to cause an invasion of another's interests in the use and enjoyment of his land is subject to liability to the other."[29] The second rule to be developed was the common-enemy rule, stating in its strictest form that "each landowner has an unqualified right, by operations on his own land, to fend off surface waters as he sees fit without being required to take into account the consequences to other landowners . . . ."[30] The reasonable-use rule provides that "[e]ach possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others. He incurs liability only when his harmful interference with the flow of surface water is unreasonable."[31]

The historical development and rationales of the three rules are discussed in the succeeding sections.

A. Natural-Flow or Civil-Law Rule

The natural-flow rule appears to have been derived from ancient Roman law through the Code Napoleon.[32] Its first American application was in an 1812 Louisiana case, *Orleans Navigation Co. v. Mayor of New Orleans*,[33] where it was held that lower ground is in natural servitude to upper ground and must receive the upper ground's waters. Second to adopt the rule was Pennsylvania, in 1848.[34] According to one authority,

---

[28] 5 WATERS AND WATER RIGHTS § 450.6; *see, e.g.*, Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966); Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956); 6A AMERICAN LAW OF PROPERTY, *supra* note 16, § 28.63; Hanks, *supra* note 6, at 687-715; Kinyon & McClure, *supra* note 3, at 893; Annot., 59 A.L.R.2d 421 (1958).

[29] Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 532, 50 Cal. Rptr. 273, 276 (1966); *accord*, Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4, 9 (1956); Kinyon & McClure, *supra* note 3, at 893.

[30] Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 531, 50 Cal. Rptr. 273, 275 (1966); *see* Gannon v. Hargadon, 92 Mass. (10 Allen) 106 (1865); Sheehan v. Flynn, 59 Minn. 436, 61 N.W. 462, 463 (1894).

[31] Kinyon & McClure, *supra* note 3, at 904; *see* Weinberg v. Northern Alas. Dev. Corp., 384 P.2d 450 (Alas. 1963); Rodrigues v. State, 52 Hawaii 166, 472 P.2d 509 (1970); Enderson v. Kelehan, 226 Minn. 163, 32 N.W.2d 286 (1948); Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956); Jones v. Boeing Co., 153 N.W.2d 897 (N.D. 1967); Sanford v. University of Utah, 26 Utah 2d 285, 488 P.2d 741 (1971).

[32] Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 532, 50 Cal. Rptr. 273, 276 (1966); Maloney & Plager, *supra* note 1, at 76.

[33] 1 La. (2 Mart. (O.S.)) 214 (1812).

[34] Martin v. Riddle, 26 Pa. 415 (1848). *But cf.* 5 WATERS AND WATER RIGHTS § 452.1, at 501 & n.90.

these early cases adopting the natural-flow rule neither considered nor referred to the common-enemy rule, which was being developed in other jurisdictions at about the same time.[35]

The rule was based on the ancient maxim, *Aqua currit et debet currere, ut currere solebat*: "Water runs, and ought to run, as it has used to run."[36] It provides that the upper landowner (or dominant estate) incurs liability for altering the natural flow of surface water *from* his land, while imposing liability on the lower landowner (or subservient estate) for obstructing the natural flow of surface water *to* his lower land.[37]

A number of rationales have been advanced for the natural-flow rule. First, most jurisdictions reasoned that the fairest manner of dealing with the problem of diffused surface water was to require each landowner to maintain the natural state of drainage rather than to allow each landowner to deal with the problem waters as he pleased.[38] Since there had to be some law governing the conditions between landowners, it seemed sensible and just that the courts take their example from the laws of nature.[39] A second justification is that the party seeking to improve his land by changing the status quo should be the party required to bear the full costs of that improvement.[40] For instance, if upper landowner *A* seeks to level and grade lot *X* in order to build a townhouse upon it, thereby rendering the surface of lot *X* impervious to rainwater, increasing and altering the flow of surface water to adjoining lot *Y*, then it is just that *A* be required to reimburse *B* (theoretically out of his profits from the improvement) for any damage to lot *Y*. Another reason set forth in support of the natural-flow rule is its predictability;[41] since water by nature is "descendible,"[42] it would seem simple for a landowner effecting change to ascertain the objects and the extent of his liability. Finally, courts may feel that the rule is necessary if only to avoid the harsh effects of the common-enemy rule.[43]

Detractors of the natural-flow rule contend that it inhibits and chills economic growth by deterring planned development through fear

---

[35] Kinyon & McClure, *supra* note 3, at 895. This may account in part for the diverse viewpoints of the two rules.

[36] 5 WATERS AND WATER RIGHTS § 450.4, at 483; *see* Hanks, *supra* note 6, at 689-90; Kinyon & McClure, *supra* note 3, at 893-94; Maloney & Plager, *supra* note 1, at 76.

[37] Kinyon & McClure, *supra* note 3, at 893-94.

[38] *Id.* at 894-95.

[39] 5 WATERS AND WATER RIGHTS § 452.1, at 502.

[40] Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 532, 50 Cal. Rptr. 273, 276 (1966).

[41] *Id.*; Hanks, *supra* note 6, at 688; Maloney & Plager, *supra* note 1, at 76.

[42] *See* note 6 and accompanying text *supra*; Annot., 59 A.L.R.2d 421, 429 (1958).

[43] 5 WATERS AND WATER RIGHTS § 452.1, at 503. Since strict application of the common-enemy rule may result in a "battle of brawn," natural-flow proponents tend to shy away from it. *See* text accompanying notes 46 through 61 *infra*.

of incurring substantial liabilities to surrounding landowners.[44]

Professor Rieck, in his treatise, states that of the 27 jurisdictions which at some time applied the natural-flow rule, by 1972 only 13 still applied the rule in substantially original form.[45]

B. The Common-Enemy Rule

Massachusetts is given credit for originating the common-enemy rule, and New Jersey for its early development.[46] In a group of cases culminating with *Gannon v. Hargadon*[47] in 1865, the courts of Massachusetts set out the doctrine based on the ancient maxim: *Cujus est solum, ejus est usque ad caelum*: "Whose is the soil, his it is even to the skies." In *Gannon,* the defendant filled ruts in a roadway near his land, causing his neighbors' land to flood. Citing three other Massachusetts cases and the *cujus est solum* maxim, the court held that the defendant was entitled to "the free and unfettered control of his own land . . . [which could] not be interfered with or restrained by any considerations of injury to others which may be occasioned by the flow of mere surface water . . . ."[48] The court further stated that any such injuries were "*damnum absque injuria.*"[49] *Union v. Durkes,*[50] an 1875 New Jersey case, first applied the name "common enemy" to this doctrine, holding that since surface water was a universal problem each possessor of land was justified in treating surface water as his "common enemy."[51] Although some courts have adopted this rule for policy reasons, a number of earlier courts accepted the rule on the assumption that it was part of

---

[44] Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 533, 50 Cal. Rptr. 273, 277 (1966); Hanks, *supra* note 6, at 688; Maloney & Plager, *supra* note 1, at 76; 17 HASTINGS L.J. 826, 833 (1966). This fear has caused some normally natural-flow jurisdictions to apply the common-enemy rule in *urban* areas. *See, e.g.,* Kay-Noojin Dev. Co. v. Hackett, 253 Ala. 538, 45 So. 2d 792 (1950). *But see* Keys v. Romley, 412 P.2d at 535, 50 Cal. Rptr. at 279; Hanks, *supra* note 6, at 690-91.

[45] 5 WATERS AND WATER RIGHTS § 452.2, at 504-05. Two states have adopted the reasonable-use rule, seven have weak authority for the natural-flow rule, and four only apply the rule to rural lands. *Id.*

[46] Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966); 3 H. FARNHAM, *supra* note 2, § 889(c), at 2591; Kinyon & McClure, *supra* note 3, at 902.

[47] 92 Mass. (10 Allen) 106 (1865).

[48] *Id.* at 109.

[49] *Id.* at 110 (loss that does not give rise to a legal action).

[50] 38 N.J.L. 21 (Sup. Ct. 1875).

[51] *See* 3 H. FARNHAM, *supra* note 2, § 889(c), at 2596. Farnham points out that Chief Justice Beasley, the author of the *Union* opinion, had supposedly quoted Lord Tenterden for the proposition that surface water was to be treated as a common enemy; however, in actuality, Lort Tenterden had given the "common enemy" appellation only to seawater. *Id. See also* Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966); Franklin v. Durgee, 71 N.H. 186, 51 A. 911 (1901).

the common law, calling it the "common law rule" of surface waters.[52] Some writers have severely criticized this assumption on the grounds that the actual common law rule did not resemble the common-enemy rule;[53] others find it impossible to determine precisely the English common law rule on surface waters.[54]

Stated in its strictest form,[55] the most valuable characteristic of the common-enemy rule is predictability. If each possessor of land is allowed to take unrestrained action in disposing of his surface water without incurring liability, then liability would be simple to predict: there would be none. The two justifications most often advanced for the rule, however, are: First, an owner of land is inherently possessed of all incidents of ownership, one of which is the unqualified and unfettered right to deal with surface water thereon;[56] second, the rule encourages development of land by all landowners.[57] In support of the second justification, one judge stated:

> The wisdom of this [common-enemy] doctrine will be apparent to all minds upon very little reflection. If the right to run in its natural channels was annexed to surface water as a legal incident, the difficulties would be infinite indeed; unless the land should be left idle it would be impossible to enforce the right in its rigor; for it is obvious every house that is built and every furrow that is made in a field, is a disturbance of such right. If such a doctrine prevailed, every acclivity would be and remain a water shed and most low ground become reservoirs. It is certain that any other doctrine but that which the law has adopted, would be altogether impracticable.[58]

Some writers have dissented from the proposition that the common-enemy rule encourages land development and that the natural-flow rule discourages it, and have stated as a general proposition that neither rule encourages nor discourages development.[59] Regarding the "incidents of ownership" rationale, one writer has said, "Such a rule must of necessity

---

[52] 3 H. FARNHAM, *supra* note 2, § 889(c); Kinyon & McClure, *supra* note 3, at 898.

[53] *See, e.g.*, 3 H. FARNHAM, *supra* note 2, § 889(c); Maloney & Plager, *supra* note 1, at 78.

[54] Kinyon & McClure, *supra* note 3, at 898-902.

[55] See text accompanying note 30 *supra*. Few courts have gone this far. *See* Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 531, 50 Cal. Rptr. 273, 275 (1966); 3 H. FARNHAM, *supra* note 2, § 889(c), at 2597; 5 WATERS AND WATER RIGHTS § 451.2, at 491.

[56] Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 531, 50 Cal. Rptr. 273, 275 (1966) (criticizing the theory as "exaggerated"); Kinyon & McClure, *supra* note 3, at 898.

[57] 5 WATERS AND WATER RIGHTS § 451.1, at 488; Hanks, *supra* note 6, at 690; Kinyon & McClure, *supra* note 3, at 898; Maloney & Plager, *supra* note 1, at 78.

[58] Bowlsby v. Speer, 31 N.J.L. 351, 353 (Sup. Ct. 1865).

[59] *See, e.g.*, Hanks, *supra* note 6, at 691. *See also* 5 WATERS AND WATER RIGHTS § 451.3, at 500 n.82.

lead to a breach of the peace . . . and . . . depends merely upon which [landowner] is the stronger."[60]

As of 1972, 18 jurisdictions retained some modification of the common-enemy rule; the remaining 12 states adhering to it at some time had either limited its application to urban land, changed to another rule, or had weak authority for the rule.[61]

C. *The Reasonable-Use Rule*

The reasonable-use rule originated in the courts of New Hampshire and Minnesota.[62] The case given credit for the rule is *Bassett v. Salisbury Manufacturing Co.*,[63] which involved underground, percolating waters. The court, after expressing dissatisfaction with doctrines of absolute ownership because they would "forbid almost any interference by each landowner with his own land,"[64] ruled that a landowner was entitled to make reasonable use of his land without fear of liability. *Swett v. Cutts*[65] applied the reasonable-use standard to surface waters in 1870. The *Swett* court stated that each landowner would have the right to make reasonable modification of the natural flow of surface waters once the "use" was found to be reasonable by the court, and that this right, once established, could be exercised without fear of incurring liability.[66] The question of reasonable use was to be determined by the jury, who should consider the following five factors in making the decision: (1) The surrounding circumstances of the case; (2) "the nature and improvements sought to be made"; (3) "the extent of the interference" with the natural flow of the surface waters; (4) the value of the improvements as compared with the injury to the plaintiff; and (5) the foreseeability of the harm.[67] In Minnesota, the reasonable-use standard developed over

---

[60] 3 H. FARNHAM, *supra* note 2, § 889(c), at 2595. The main disadvantage is that the rule is "likely to promote drainage contests." Annot., 59 A.L.R.2d 421, 423 (1958). *See also* Bassett v. Salisbury Mfg. Co., 43 N.H. 569, 575 (1862).

[61] *See* 5 WATERS AND WATER RIGHTS § 451.2, at 489-91 & nn.57-60. Six have changed to another standard. Three limit its application to urban land. Three have weak authority. *Id.*

[62] 5 WATERS AND WATER RIGHTS § 453.1; Kinyon & McClure, *supra* note 3, at 904-05. For an extended discussion of the New Hampshire cases, see Kalinski & Forste, *supra* note 16. *See also* Annot., 59 A.L.R.2d 421, 434-35 (1958).

[63] 43 N.H. 569 (1862).

[64] *Id.* at 575.

[65] 50 N.H. 439 (1870).

[66] *Id.* at 446. In Franklin v. Durgee, 71 N.H. 186, 51 A. 911 (1901), the New Hampshire court reemphasized the state's adherence to the rule. The court also stressed that a case would turn on the finding of a reasonable use: "For the consequence to others of such a [reasonable] use he is not responsible." *Id.* at 186, 51 A. at 911.

[67] 50 N.H. at 446.

a number of years[68] and was finally verbalized in the 1894 case of *Sheehan v. Flynn*.[69] In this case it was held a reasonable use of land for a municipality to drain seasonal floods from private land to make possible a municipal highway. The court reviewed the trend in Minnesota law and held "that one has a right to drain his land for any *legitimate use*, . . . whether the improvement is directly and wholly for the purpose of drainage, or whether it is for some other purpose, and such drainage is a mere incident result."[70] The court emphasized, however, that the landowner could cause no unnecessary injury to another landowner in exercising his reasonable use.[71] In *Enderson v. Kelehan*,[72] the Minnesota court laid down a similarly "flexible" four-part test which has been cited and followed in several jurisdictions.[73]

One reason that courts have adopted the reasonable-use rule is

---

[68] *See* Kinyon & McClure, *supra* note 3, at 908-09.

[69] 59 Minn. 436, 61 N.W. 462 (1894).

[70] 61 N.W. at 466 (emphasis added).

[71] *Id.*

[72] 226 Minn. 163, 32 N.W.2d 286 (1948).

[73] *See, e.g.*, Weinberg v. Northern Alas. Dev. Corp., 384 P.2d 450 (Alas. 1963). The four-part test is as follows:

> [I]n effecting a reasonable use of his land for a legitimate purpose a landowner, acting in good faith, may drain his land of surface waters and cast them as a burden upon the land of another, although such drainage carries with it some waters which would otherwise have never gone that way but would have remained on the land until they were absorbed by the soil or evaporated in the air, if
>
> (a) There is reasonable necessity for such drainage;
>
> (b) If reasonable care be taken to avoid unnecessary injury to the land receiving the burden;
>
> (c) If the utility or benefit accruing to the land drained reasonably outweighs the gravity of the harm resulting to the land receiving the burden; and
>
> (d) If, where practicable, it is accomplished by reasonably improving and aiding the normal and natural system of drainage according to its reasonable carrying capacity, or if, in the absence of a practicable natural drain, a reasonable and feasible alternative drainage system is adopted.

Enderson v. Kelehan, 226 Minn. 163, 32 N.W.2d 286, 289 (1942). *See also* RESTATEMENT OF TORTS §§ 822-40 (1939).

Professor Beck sets forth three basic questions common to "reasonable use" tests in jurisdictions today:

> (1) Was there a reasonable necessity for the actor to alter the drainage to make use of his land?
>
> (2) Was the alteration done in a reasonable manner? That is, was due care taken to prevent injury to another's land? Was the natural drainage pattern followed as much as possible? Is the artificial drainage system reasonably feasible?
>
> (3) Does the utility of the actor's conduct reasonably outweigh the gravity of the harm done to others?

5 WATERS AND WATER RIGHTS § 453.3 (footnotes omitted).

judicial dissatisfaction with both the natural-flow and common-enemy rules.[74] Another reason has been added flexibility through the rule's use of tort rather than property terms.[75]

As of 1972, eight jurisdictions had fully adopted the reasonable-use rule, and five had adopted it for certain types of cases.[76]

IV. National Trends

Since the inception of the first two rules,[77] their harsh effects have been tempered in the vast majority of jurisdictions either by the creation of exceptions or by the addition of a criterion of reasonableness.[78] Virtually every jurisdiction, for example, regardless of the rule espoused, recognizes as an exception that an upper landowner may not collect surface waters and then discharge them upon his lower neighbor;[79] a substantial majority of jurisdictions requires a landowner to exercise "due care" when altering the flow of surface waters so as not to cause unnecessary damage to an affected landowner;[80] and in many natural-flow jurisdictions, a reasonable-use or reasonable-care modification has been added to the existing rule.[81] Other widely approved exceptions to the two rules are: Most jurisdictions allow some acceleration and diversion of surface waters by an upper landowner without imposing liability;[82] and most jurisdictions, if not all, forbid obstruction of watercourses.[83] The multitude of exceptions, and their inflexible application,[84] have encouraged several jurisdictions to adopt the reasonable-use rule

---

[74] *See, e.g.,* Franklin v. Durgee, 71 N.H. 186, 51 A. 911 (1901).

[75] *See, e.g.,* Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956).

[76] *See* 5 Waters and Water Rights § 453.2. The eight jurisdictions adopting the reasonable-use standard are: Weinberg v. Northern Alas. Dev. Corp., 384 P.2d 450 (Alas. 1963); Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970); Klutey v. Commonwealth, 428 S.W.2d 766 (Ky. 1967); Enderson v. Kelehan, 226 Minn. 163, 32 N.W.2d 286 (1948); Franklin v. Durgee, 71 N.H. 186, 51 A. 911 (1901); Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956); Jones v. Boeing Co., 153 N.W.2d 897 (N.D. 1967); Sanford v. University of Utah, 26 Utah 2d 285, 488 P.2d 741 (1971).

[77] The two are the natural-flow and common-enemy rules.

[78] *See generally* 5 Waters and Water Rights §§ 451-53; Kinyon & McClure, *supra* note 3.

[79] 5 Waters and Water Rights § 451.2(A). *See* text accompanying note 97 *infra.*

[80] 5 Waters and Water Rights § 451.2(C). This has been called the "reasonable alternative" rule. *See, e.g.,* notes 116 through 118 and accompanying text *infra.*

[81] 5 Waters and Water Rights § 452.2(C).

[82] *Id.* § 452.2(A).

[83] *Id.* § 451.2(E), at 495-99. Professor Beck, in 1972, summarized existing state rules:

a. In most jurisdictions:

1. A landowner *may not* obstruct the natural flow in a watercourse (liberally defined in some jurisdictions) to the injury of another.

2. A landowner *may not* collect unusual amounts of diffused surface waters and discharge them onto adjoining land to its injury.

in recent years[85] and have moved many writers to call for such adoption.[86]

Although the reasonable-use test is relatively unpredictable, considerations of justice and land development policy mandate its use.[87]

V. Mississippi Surface Water Law

Mississippi cases on diffused surface water have involved primarily four types of defendants: railroads,[88] drainage districts or levee commissions,[89] state subdivisions,[90] and private landowners and developers.[91] In these cases, the Mississippi Supreme Court has discussed a variety of drainage-law doctrines, including a modified common-enemy rule,[92] a natural-flow rule,[93] and an overtaxing capacity[94] rule. These

---

3. A landowner *may not* divert onto another's land, to its injury, diffused surface waters from an area that did not naturally drain that way.
4. A landowner *may* drain diffused surface water into a watercourse (liberally defined in some jurisdictions) subject to the overtaxing capacity, the anti-collecting-and-discharging, and anti-diversion rules.
5. In all other respects concerning his conduct with diffused surface waters, the landowner is subject to a rule of reasonable use of his land whether it relates to acceleration or repulsion of flow.

b. In a growing number of jurisdictions, all conduct of a landowner with reference to diffused surface waters is subject to the reasonable-use standard, but some types of conduct prohibited by express rule in most jurisdictions may well approach per se unreasonableness.

c. The law of a *particular* state may not pattern the foregoing summary, since its law might not yet reflect the general approach to the problems.

Id. § 456.1 (emphasis in original).

[84] Kinyon & McClure, *supra* note 3, at 913.

[85] *See* note 76 and accompanying text *supra.*

[86] *See, e.g.,* 5 Waters and Water Rights § 457.5; Kinyon & McClure, *supra* note 3, at 935.

[87] In 5 Waters and Water Rights § 457, the author reaches a similar conclusion.

[88] *See, e.g.,* Meridian v. New Orleans & N.E.R.R., 291 F. Supp. 303 (S.D. Miss. 1968); Illinois Cent. R.R. v. Wright, 135 Miss. 435, 100 So. 1 (1924); Mississippi Cent. Ry. v. Caruth, 51 Miss. 77 (1875).

[89] *See, e.g.,* Board of Drainage Comm'rs v. Board of Drainage Comm'rs, 130 Miss. 764, 95 So. 75 (1923); Belzoni Drainage Comm'n v. Winn, 98 Miss. 359, 53 So. 778 (1910).

[90] *See, e.g.,* Mississippi State Highway Comm'n v. Thomas, 202 So. 2d 925 (Miss. 1967); Leflore County v. Cannon, 81 Miss. 334, 33 So. 81 (1902); City of Vicksburg v. Herman, 72 Miss. 211, 16 So. 434 (1894).

[91] *See, e.g.,* Lauck v. Gilbert, 252 Miss. 371, 173 So. 2d 626 (1965); Jones v. Walker, 44 So. 2d 466 (Miss. 1950).

[92] [W]hen adjoining lots owned by different persons are on a different level, so that there will be a natural flow of rainwater in a diffused state from the higher to the lower level, the owner of the lower lot may fend the water therefrom, provided he does so for proper objects and exercises reasonable care to prevent unnecessary injury to the higher lot.

Holman v. Richardson, 115 Miss. 169, 179, 76 So. 136, 137 (1917). *But see* Kansas City,

discussions have led to a variety of decisions; for example, the court has held that although an upper owner cannot collect surface water and discharge it onto his neighbor's land,[95] he can fight vagrant flood waters as a common enemy in any reasonable manner with no liability for damages.[96] The cases fall into six general categories which are useful in exploring how a landowner can alter natural drainage without incurring liability.

A. Collecting and Discharging Diffused Surface Waters

In 1891, the Mississippi Supreme Court adopted the majority rule that an upper owner cannot collect and concentrate diffused surface water and discharge this water onto an adjacent lower owner's property.[97] The court has expanded this rule to include water collected in an excavation,[98] water discharged because of increase in size of ditches,[99] and water impounded by a railroad embankment.[100] If upon releasing a concentrated flow the upper owner has caused more water to flow upon the lower land than would have flowed there naturally, the lower owner is under no duty to provide for the excess flow,[101] and an injunction and

---

M. & B. Ry. v. Smith, 72 Miss. 677, 17 So. 78 (1895), in which the court casts doubt on there ever being a common law to modify. *See* text accompanying notes 52 & 53 *supra*.

[93] The natural-flow or civil-law maxim, *Aqua currit et debet currere ut currere solebat,* has been directly applied in two cases in which a watercourse was dammed. Leflore County v. Cannon, 81 Miss. 334, 33 So. 81 (1902); Liles v. Cawthorn, 78 Miss. 559, 29 So. 834 (1901). However, the court has not applied the natural-flow rule in surface water cases. *See also* Steed v. Kimbrough, 197 Miss. 430, 19 So. 2d 925 (1944); 5 WATERS AND WATER RIGHTS § 456.2, at 558; Comment, *supra* note 14, at 218-19.

[94] Board of Drainage Comm'rs v. Board of Drainage Comm'rs, 130 Miss. 764, 95 So. 75 (1923). *See* part V(C) *infra*.

[95] *See, e.g.,* Shattles v. Field, Brackett & Pitts Inc., 261 So. 2d 795 (Miss. 1972); Illinois Cent. R.R. v. Miller, 68 Miss. 760, 10 So. 61 (1891).

[96] *See, e.g.,* Jones v. Walker, 44 So. 2d 466 (Miss. 1950); Mobile & O. Ry. v. Tays, 142 Miss. 743, 107 So. 871 (1926).

[97] Illinois Cent. R.R. v. Miller, 68 Miss. 760, 10 So. 61 (1891). The court stated:

> [N]either under the rule of the civil nor of the common law is one permitted to collect surface-water, falling upon his own land or that of another, in artificial channels, and to discharge it in undue and unnatural quantities upon the land of another.

Id. at 764, 10 So. at 62.

[98] Filtrol Corp. v. Hughes, 199 Miss. 10, 23 So. 2d 891 (1945); Cresson v. Louisville & N. Ry., 166 Miss. 352, 146 So. 462 (1933).

[99] Illinois Cent. R.R. v. George, 241 Miss. 233, 130 So. 2d 260 (1961); Harvey v. Illinois Cent. R.R., 111 Miss. 835, 72 So. 273 (1916) (issue was limiting rights to those enjoyed during prescriptive period). *See also* Jackson v. Robertson, 208 Miss. 422, 44 So. 2d 523 (1950).

[100] Kansas City, M. & B. R.R. v. Lackey, 72 Miss. 881, 16 So. 909 (1895).

[101] The majority in Steed v. Kimbrough, 197 Miss. 430, 19 So. 2d 925 (1944), announced three rules applicable to surface waters:

damages are proper remedies.[102] If the diversion causes no increase in the natural flow, the lower owner may use reasonable means in diverting the water.[103]

An example of clear violation of this rule is found in *Shattles v. Field, Brackett & Pitts, Inc.*[104] A city refused to approve a subdivision until the developers made provisions for draining surface water which had collected on an adjacent development. The developers constructed a system of underground tiles across the poorly drained area, ending with a brick culvert adjacent to the plaintiff's property line, thereby turning all of the surface water onto the lower land. The developers then excavated a ditch 70-feet long across the plaintiff's property. Prior to the construction of the drains and culvert, the natural drainage from the upper property crossed plaintiff's lower property in a diffused state. Since only surface water was involved and there was clearly a "collec-

---

(1) When no improvements have been made upon the contiguous upper land and it remains in its natural state, the right is in the owner thereof that the diffused surface waters thereon shall flow therefrom upon and into the contiguous lower land.

(2) The owner of the lower land has the right upon receiving the upper diffused waters to take such steps and to use such means as he may elect to carry the water away from his lower land so long as in so doing he does not use any of the upper land or so impede the flow as to cause it to back up or accumulate upon the upper land to any greater extent than it would have accumulated under natural conditions.

(3) The owner of the upper land does not have the right to collect his surface waters into an artificial channel or channels and then discharge it or allow it to be discharged upon the lower land at a *greater volume* or in a *more concentrated flow* than would have resulted had the *natural conditions* been left undisturbed, from which it follows that when by alterations made by the upper owner in natural conditions the result would be to cast upon the lower owner the water in a greater volume or in a more concentrated flow, the upper owner by means of his own land must take care of the excess, or must do so in cooperation with the lower owner.

Id. at 436, 19 So. at 926 (emphasis added). Dissenting in part, Chief Justice Smith stated that rule (3) is supported by prior cases but that rules (1) and (2) are departures from Mississippi law. *Id.* at 437, 19 So. 2d at 927; *see* 5 WATERS AND WATER RIGHTS § 456.2, at 558.

Cf. Palmer v. Massengill, 214 Miss. 379, 58 So. 2d 918 (1952), in which an upper owner constructed a ditch to straighten a slough and in doing so cast a concentrated flow upon the lower owner. The lower owner constructed a dam to impede the accelerated flow, and the court stated that if this dam were reasonably constructed, "there was no duty upon [the lower owner] to serve the interest of [the upper owners] by giving to them a drainage ditch to protect them against the consequences of a wrong committed by them." *Id.* at 389, 58 So. 2d at 921.

[102] *See, e.g.*, Kansas City, M. & B. R.R. v. Lackey, 72 Miss. 881, 16 So. 909 (1895) (damages).

[103] Holman v. Richardson, 115 Miss. 169, 76 So. 136 (1917).

[104] 261 So. 2d 795 (Miss. 1972).

tion," the court had no difficulty in holding that an injunction and damages were proper remedies.[105]

Most of the collection cases involve more subtle violations by landowners. In *Newton Coca Cola Bottling Co. v. Murphrey*,[106] there was no actual "collection" by artificial means, but the total effect of appellant's grading was to "concentrate" the flow of surface water.[107] Appellant purchased a hilly, unimproved upper tract adjacent to appellee's lower lot. After appellant graded the property, surface water which had flowed in a diffused state onto the lower lot was concentrated in a southwardly and southeasterly flow. The appellant contended that no additional water had been diverted by the grading[108] and that he had taken reasonable steps to correct the drainage. The court held that the changes in the natural slope of the upper land had caused a concentration of water along the south line of the property, resulting in substantial damage to the lower owner.[109] The appellant's effort to provide proper drainage was inadequate as a remedy and served only to eliminate the possibility of punitive damages.[110]

The court has had no difficulty in determining liability in collection cases, and it appears that lower owners are free from this type of nuisance in Mississippi so long as surface waters and not watercourses are involved.[111]

B. Impeding the Flow of Surface Water

The earliest reported cases concerning impeding surface water drainage involve railroads.[112] In *Sinai v. Louisville, New Orleans & Texas Railway*,[113] the court formulated a special rule by applying "common law principles to new and changed conditions."[114] In constructing

---

[105] The chancellor had dismissed the case without prejudice since he felt that an action at law for damages would provide an adequate remedy. *Id.* at 796. In reversing, the court stated that such a limitation "would be tantamount to granting the defendants the right of eminent domain." *Id.* at 798.

[106] 212 Miss. 823, 55 So. 2d 485 (1951).

[107] *Id.* at 833, 55 So. 2d at 489.

[108] The court appears to have accepted the chancellor's finding that additional water was diverted, but the issue is moot since the court cites 56 AM. JUR. *Waters* § 70, at 555-57 (1947), with approval. 212 Miss. at 831-32, 55 So. 2d at 488. That section states that the rule applies even if no additional water is diverted.

[109] 212 Miss. at 833, 55 So. 2d 489.

[110] *Id.* at 830, 55 So. 2d at 488.

[111] For cases involving discharging surface water into a watercourse, see part V(C) *infra*.

[112] *See, e.g.*, Canton, A. & N. R.R. v. Paine, 19 So. 199 (Miss. 1896); Sinai v. Louisville, N. O. & T. Ry., 71 Miss. 547, 14 So. 87 (1893); Mississippi Cent. R.R. v. Caruth, 51 Miss. 77 (1875).

[113] 71 Miss. 547, 14 So. 87 (1893).

[114] *Id.* at 552, 14 So. at 88.

its roadbed, the railroad built a solid embankment across a slight depression, impounding rainwater and overflow water. The obstructed surface water damaged the plaintiff's land and crops, but no remedy was provided by the lower court. Although the railroad contended that the common-enemy rule had been adopted in Mississippi,[115] the court neither affirmed nor denied that contention. Instead, it fashioned a modification of the rule that surface waters are a common enemy:

> If in the execution of chartered rights it shall become necessary to do a particular act in a particular manner, it [the railway corporation] may safely do so, though evil may result to others; but if the same act may as well be done for the railway's interests in another way, and without hurt to others, reason and justice will require the adoption of the non-hurtful method of executing its powers. The execution of its rights in a particular method foreseen to be fraught with peril and injury to others, when another method, equally safe, convenient and useful, is rejected, will subject the corporation to the imputation of wilful negligence.[116]

Since the railroad could have constructed a trestle as easily as an embankment, the court reversed and remanded the case for an application of the above-stated principle.[117]

The reasonable-alternative rule announced in *Sinai* would have had little effect on private landowners in this state after the railroad boom if the court had not applied that rule in *Holman v. Richardson*.[118] Appellant and appellee owned adjoining lots, appellee's lot being slightly higher than appellant's. A natural swale or hollow extended across the higher property and directed surface water onto the lower property. Two or more underground tile drains collected water from appellee's lot and discharged this water into the swale at the line dividing the two parcels.

---

[115] Brief for Appellee, Sinai v. Louisville, N. O. & T. Ry., 71 Miss. 547, 549-50 (1893).

[116] 71 Miss. at 553-54, 14 So. at 89.

[117] The court has consistently applied the reasonable-alternative rule in subsequent railroad cases. Alabama Great S.R.R. v. Broach, 238 Miss. 618, 119 So. 2d 923 (1960); Louisville & N.R.R. v. Capdepon, 192 Miss. 28, 4 So. 2d 544 (1941) (railroad liable for improper maintenance as well as improper construction); Columbus & G. Ry. v. Taylor, 149 Miss. 269, 115 So. 200 (1928); Yazoo & M.V. Ry. v. McConnell, 127 Miss. 581, 90 So. 321 (1922); Yazoo & M.V. Ry. v. Jones, 118 Miss. 224, 79 So. 65 (1918); Yazoo & M.V. Ry. v. Scott, 110 Miss. 443, 70 So. 459 (1916); Alabama & V. Ry. v. Daniels, 108 Miss. 68, 66 So. 324 (1914); Thompson v. Mobile, J. & K.C.R.R., 104 Miss. 651, 61 So. 596 (1913) (reasonable alternative applies only to surface water and not to watercourse); Alabama & M.R.R. v. Beard, 93 Miss. 294, 48 So. 405 (1909); Patterson v. Illinois Cent. R.R., 29 So. 93 (Miss. 1901) (whether a culvert or unprecedented rains caused the damage is a jury question); Illinois Cent. R.R. v. Wilbourn, 74 Miss. 284, 21 So. 1 (1896); Canton, A. & N.R.R. v. Paine, 19 So. 199 (Miss. 1896).

[118] 112 Miss. 216, 72 So. 921 (1916), *withdrawn on suggestion of error,* 115 Miss. 169, 76 So. 136 (1917).

(In spite of the underground drain, the majority ruled that this was not a case of collecting and discharging surface water.)[119] Since the flow of water was damaging the lower owner's garden, she began construction of a brick wall along the dividing line to dam the surface water and cast it back onto the higher lot.

When the court first heard the case, it stated that "we have no hesitancy in declaring the common-law rule prevails in this state,"[120] that is, surface water is a common enemy and may be fought in any manner regardless of the effect.[121] The lower owner was allowed to continue the construction of the wall and the upper owner had no grounds for complaint.

The court heard the case a second time, on suggestion of error, and stated that a discussion of civil and common law rules would be of no value since *Sinai* clearly had established a modification in the area of diverting surface water.[122] The majority appears to have ignored an earlier statement that "the courts adopted a rule with regard to the flow of surface water applicable to railroads which would not apply to ordinary landowners."[123] Applying *Sinai* to the present case, the court concluded that the lower owner could construct the wall, provided that it was constructed reasonably and would not interfere with the flow of surface water.[124]

Justice Cook, dissenting, contended that the decision had changed

---

[119] The majority stated:

> It appears, however, from the evidence that the conformation of the surface of appellee's lot is such that the underground tile drains complained of do not cause any more water to collect at the head of and flow through the ditch across appellant's lot than would so do without them, and it does not appear that they accelerate the flow of the water to such an extent as to thereby damage appellant more than she would be without them, from which it necessarily follows that she has no ground of complaint because of their existence.

115 Miss. at 181, 76 So. at 138. Justice Stevens, concurring in the reversal, disagreed with the above statement, lamenting: "I fail to see the justice of permitting a well-to-do landlord to install a system of underground tiling and by means thereof to concentrate at one point and project surface water upon the humble garden spot of a helpless widow." *Id.* at 182, 76 So. at 138.

The majority's discussion of the tiles' not directing "more water" appears irrelevant in light of the opinion in Newton Coca Cola Bottling Co. v. Murphrey, 212 Miss. 823, 55 So. 2d 485 (1951), and note 108 *supra*.

For defenses available if additional water is diverted, see Palmer v. Massengill, 214 Miss. 379, 58 So. 2d 918 (1952), and note 101 *supra*.

[120] 112 Miss. at 219, 72 So. at 922.

[121] *Id.*

[122] 115 Miss. at 179, 76 So. at 137. *See* text accompanying notes 113 through 117 *supra*.

[123] Thompson v. Mobile, J. & K.C.R.R., 104 Miss. 651, 660, 61 So. 596, 597 (1913).

[124] The court noted that a ditch could be installed at no greater expense than a wall, but that the wall could be constructed in a reasonable manner so as not to interfere with the surface water drainage. 115 Miss. at 180-81, 76 So. at 137.

Mississippi law and could be defended only "upon the civil law theory that the upper estate is the dominant estate and the lower estate is the servient estate."[125] Significantly, however, the modified common law or reasonable-alternative rule can be distinguished from the civil law; the lower estate is servient in Mississippi only to the extent that a reasonable means must be applied in blocking surface water. The prohibition against obstruction is not absolute since the complainant must demonstrate that another method, equally safe, convenient, and economical, could be employed without obstruction of surface water.[126] The rule subsequently has been applied to prevent a lower owner from raising the level of his lot above the level of adjacent property without providing adequate drainage.[127] If a lower owner has constructed an artificial drain wholly on his own property, however, he is under no duty to maintain the drain for the benefit of an upper owner if subsequent natural conditions have imposed an unreasonable burden of maintenance.[128]

C. Overtaxing the Capacity of a Watercourse

Land bordering on a natural watercourse[129] is subject to damage from an increased flow of that watercourse. A Mississippi owner may find himself completely unable to recover damages in this situation even though an upper owner has collected and discharged all of his surface water into the course.[130] This seemingly inequitable situation entered the common law of Mississippi in *Board of Drainage Commissioners v. Board of Drainage Commissioners.*[131] Bolivar County Drainage District and 10 other districts, by increasing the size of natural watercourses and by constructing artificial drains, sought to drain their collected surface water into Bogue Phalia, a natural watercourse approximately 80-miles long. The effect of this action would be to inundate 35,000 acres of farm land which bordered the lower section of the bogue. The lower owners sought an injunction, which was denied.

Since the case was one of first impression in Mississippi, the court had a choice between the majority view, which limits discharging surface water into a watercourse, and the minority view, which allows

---

[125] *Id.* at 187, 76 So. at 140.

[126] Miller v. Ervin, 192 Miss. 712, 6 So. 2d 910 (1942); Alabama & M.R.R. v. Bears, 93 Miss. 294, 48 So. 405 (1909); Yazoo & M.V. Ry. v. David, 73 Miss. 678, 19 So. 487 (1896).

[127] Cowan v. Baker, 227 Miss. 828, 87 So. 2d 74 (1956).

[128] Brinkley v. Eaton, 205 Miss. 815, 39 So. 2d 491 (1949).

[129] For Mississippi's definition of "watercourse," see Lauck v. Gilbert, 252 Miss. 371, 394-95, 173 So. 2d 626, 637 (1965).

[130] *E.g.,* Haisch v. Southaven Land Co., 274 F. Supp. 392 (N.D. Miss. 1967).

[131] 130 Miss. 764, 95 So. 75 (1923).

unlimited drainage.[132] At the time of the decision, a large portion of fertile delta land was not arable due to marshy conditions. The court adopted the minority rule since it felt that such a rule would promote progress in the undeveloped agricultural areas of the state:

> After a careful consideration of the difficult question presented, we have decided to follow that line of decisions which hold that the upper owner may reasonably drain his surface waters into the natural watercourse, in good husbandry, and this right may be exercised by him without any qualification or limit; and if he thereby increase the flow of the stream beyond its capacity, which results in flooding and damaging the lower owner, such damage will be *damnum absque injuria;* damage without legal injury, for which no right of action will lie.[133]

The court modified the minority rule in adopting it: overtaxing the capacity of a watercourse must be done "reasonably" or "in good husbandry."[134] This modification, however, has had little effect on subsequent cases, as revealed in the discussion below.[135]

In *Haisch v. Southaven Land Co.,*[136] a private real estate developer,

---

[132] The court summarized the two views as follows:

> We have no decision of our courts to govern us, and the authorities elsewhere are in conflict; the greater weight, in number of decisions, however, supports the principle that the upper owner is not unlimited in his use of the watercourse, and cannot increase the flow of the stream beyond its natural capacity to the injury of another. In other words, the majority of the courts hold, and the text-writers announce it as the accepted view, that the right of the upper owner to drain into the watercourse is qualified to the extent that the flow must not be increased beyond the capacity of the stream.
>
> There is also a line of decisions announcing the opposite view that the right to drain into the outlet is unlimited; that the capacity of the stream may be exceeded, and the resulting damage to lower owners is *damnum absque injuria.*

Id. at 794, 95 So. at 78.

[133] *Id.* at 796-97, 95 So. at 79.

[134] Complainants argued that a method resulting in less damage was available, but the court stated that the allegation was insufficient to bring the drainage districts within the rule that, "where there are two reasonable ways of constructing, one of which would damage the appellee and the other do him no injury, the latter plan should be followed." *Id.* at 801, 95 So. at 80. The court did imply that the reasonable-alternative rule would apply to overtaxing the capacity of a watercourse as well as to impeding surface water. *See also* text accompanying note 116 *supra.*

[135] Justice Ethridge, in a concurring opinion, expressed reluctance to grant a corporation with the power of eminent domain the right to damage property without paying compensation. He concluded that the drainage districts have consistently been exempt from liability except in cases involving a direct taking and that the majority's decision can be upheld only upon that unfortunate exemption. 130 Miss. at 801-02, 95 So. at 80-81.

Interestingly the court has not discussed damages under MISS.CONST. art. 3, § 17 (1890), in cases involving railroads. *See* note 169 and accompanying text *infra.*

[136] 274 F. Supp. 392 (N.D. Miss. 1967).

rather than a drainage district, overtaxed a natural watercourse and injured a lower riparian owner. At the center of the lower property three streams converged into one natural watercourse which emptied into Horn Lake Creek. The upper land, purchased by the appellee, drained into these streams naturally; however, prior to appellee's grading, the flow of surface water into the watercourses was slowed by vegetation and percolation. After the upper lands were graded, houses were constructed and curbs and gutters installed. Consequently, the velocity of surface water was increased, allegedly damaging the lower land.[137] No reasonable alternative was offered by the lower owner, and the court denied damages, following the *Board of Drainage Commissioners* decision.[138]

Lower riparian owners are recognized as having a right similar to the upper owners' right to accelerate the flow of a watercourse in *American Sand & Gravel Co. v. Rushing.*[139] A lower owner extracted sand and gravel from a stream below the appellee's land. A pond resulted, causing an acceleration of streamflow through the upper land. The court held that any damage was *damnum absque injuria,* basing its decision on a corollary of the overtaxing capacity rule.[140]

At the time the court in *Board of Drainage Commissioners* adopted the minority view, the decision arguably was a practical one, based on a policy of continued progress and development, primarily in the delta. If the court had taken a different approach, most swampy lands in this state might well be unfit for agriculture. The ruling is now finding its way into cases involving subdivision development and grading hilly lands for other commerical purposes.[141] Changing sloping terrain into

---

[137] Although the lower owner contended that his property had been damaged, the court noted that several witnesses testified that there had been no "appreciable change" in the property since the development of upper lands. *Id.* at 396. The lower owner also failed to offer any proof of damages. *Id.* at 400.

[138] In the only "overtaxing capacity" case decided since *Haisch,* the court cited *Board of Drainage Commissioners* with approval but did not cite *Haisch.* Homes Inc. v. Anderson, 235 So. 2d 680 (Miss. 1970). However, *Homes* offers no additional insight into Mississippi law on surface water drainage since the primary issue was proximate cause.

[139] 183 Miss. 496, 184 So. 60 (1938).

[140] The court first examined the reasonableness of mining gravel in the area and then stated:

> Since . . . the upper landowner may so improve and reclaim, it would follow, upon equal reason, that the owner below the complaining landowner may do the like, when there are no exceptional circumstances, — may straighten the watercourse on the lands below the complaining landowner by an artificial channel along the course of the said natural watercourse of such width and depth as to prevent overflow on said lower lands, even though it increases the velocity of the flow on the upper lands.

Id. at 503-04, 184 So. at 62.

[141] *E.g.,* Haisch v. Southaven Land Co., 274 F. Supp. 392 (N.D. Miss. 1967); American Sand & Gravel Co. v. Rushing, 183 Miss. 496, 184 So. 60 (1938).

reasonably level building sites necessarily requires changing the course of diffused surface water. If the developer is sufficiently fortunate to have an accessible watercourse, and if his draining and developing are reasonable, he can collect or concentrate surface water and discharge it indirectly onto lower lands with no fear of civil sanctions. According to the court's "reasonableness" test, the lower owner must dredge or widen the channel along his land at his own expense. If this expense outweighs the utility of the upper owner's conduct, however, the court has a readily available means of imposing liability by distinguishing such a case from its decision in *Board of Drainage Commissioners.*[142]

D. Diverting "Vagrant Flood Waters"

Mississippi's abundant supply of water has forced many landowners to seek public and private means of flood control. The right to defend property against overflow waters was established by the United States Supreme Court in *Cubbins v. Mississippi River Commission.*[143] The Mississippi court has upheld the right in numerous decisions since *Cubbins.*[144] Although these cases involve obstruction, diversion, or collection of water, they compose a separate class with unique rules.

In *Indian Creek Drainage District v. Garrott,*[145] the appellant constructed a levee to contain floodwaters of the Coldwater River. Several sloughs were obstructed, and the floodwaters were diverted onto the farmland of the appellees. The court stated that "[s]uch diversion of vagrant flood waters, when incident to and reasonably necessary to the effective protection of the lands in the levee district, is within the phrase '*damnum absque injuria*'."[146] The court also held that the obstructed sloughs were not "watercourses" since the only water flowing through those channels was floodwater or overflow water.[147] With its reasonable-

---

[142] The court examined both the utility of the upper owners' conduct and the reasonableness of the means chosen for drainage. It also noted that the watercourse was sufficient in size to drain ordinarily the 600-square-mile watershed. Board of Drainage Comm'rs v. Board of Drainage Comm'rs, 130 Miss. 764, 800, 95 So. 75, 80 (1923). If the upper owners' use had not been reasonable, or if the watercourse had been smaller, it appears that a different decision would have been reached.

Neither *Haisch* nor *American Sand* changes the principle stated above since both cases were decided more on the grounds of proof of damages or proximate cause than on the reasonableness of use.

[143] 241 U.S. 351 (1915).

[144] *E.g.*, Jones v. Walker, 44 So. 2d 466 (Miss. 1950); Covington v. Cassidy Bayou Drainage Dist., 154 Miss. 119, 122 So. 205 (1929); Mobile & O. Ry. v. Tays, 142 Miss. 743, 107 So. 871 (1926); Toler v. Bear Creek Drainage Dist., 141 Miss. 851, 106 So. 88 (1925); Herring v. Lee County, 130 Miss. 1, 93 So. 436 (1922); Jones v. George, 126 Miss. 576, 89 So. 231 (1921); Indian Creek Drainage Dist. v. Garrott, 123 Miss. 301, 85 So. 312 (1920).

[145] 123 Miss. 301, 85 So. 312 (1920).

[146] *Id.* at 320, 85 So. at 318.

[147] *Id.* at 322-23, 85 So. at 319; *see* part V(E) *infra.*

use limitation, the court reiterated a modified common-enemy view expressed in earlier decisions.[148]

Justice Ethridge dissented in *Indian Creek,* citing the constitutional provision that private property cannot be taken (or damaged) for public use without compensation.[149] He dissented again in *Jones v. George,*[150] but finally succumbed in *Herring v. Lee County.*[151] In the latter two cases, damages were denied even though private property had been damaged by the erection of levees for a public use.[152]

As stated earlier, a landowner whose land borders a watercourse may find the flow of that watercourse significantly increased to his detriment with no recourse at law or in equity.[153] It is now clear that his land is also subject to damage without legal injury from obstructed overflow waters.[154] The court has justified the overtaxing capacity cases on the grounds that such injury is foreseeable and necessary for development of upper lands.[155] There is no such foreseeability in the floodwater cases, and the loss to the lower owner can be justified only by balancing the benefits of damming the water against the detriment to those whose land is damaged.

E. Obstruction or Diversion of a Watercourse

The basic tenet of the natural-flow rule,[156] that "water runs, and

---

[148] *See* notes 118 through 128 and accompanying text *supra*. The rule is stated more succinctly in Toler v. Bear Creek Drainage Dist., 141 Miss. 851, 106 So. 88 (1925):

> They have the right at common law to fend [flood water] from their land, but if there are two ways of doing so, each equally efficacious and neither requiring unreasonably greater expense than the other, one of which will damage adjoining property and the other will not, the latter method must be adopted by them.

Id. at 864, 106 So. at 90.

[149] *Accord,* Columbus & G. Ry. v. Taylor, 149 Miss. 269, 115 So. 200 (1928); Mobile & O. Ry. v. Tays, 142 Miss. 743, 107 So. 871 (1926); Kansas City, M. & B.R.R. v. Smith, 72 Miss. 677, 17 So. 78 (1895); MISS. CONST. art. 3, § 17 (1890). *See* part V(F) *infra.*

[150] 126 Miss. 576, 586, 89 So. 231, 234 (1921).

[151] 130 Miss. 1, 93 So. 436 (1922). *But see* Covington v. Cassidy Bayou Drainage Dist., 154 Miss. 119, 142, 122 So. 205, 211 (1929), in which Justice Ethridge dissents again, but on the ground that the water involved was not overflow water.

[152] In Jones v. Walker, 44 So. 2d 466 (Miss. 1950), a private landowner was afforded the same rights in obstructing floodwater as public corporations had been granted in the earlier cases. Any damage was *damnum absque injuria.*

[153] *See* part V(C) *supra.*

[154] The court has offered no concise definition of exactly what kind of flood or overflow waters can be obstructed, but the category is not broad enough to allow obstruction of "surface water drainage following rains that can be predicted or anticipated to occur during periodic cycles . . . ." City of Meridian v. New Orleans & N.E.R.R., 291 F. Supp. 303, 307 (S.D. Miss. 1968). Such a case falls under obstructing surface waters or watercourses and is not properly a floodwater case.

[155] *See* notes 131 through 133 and accompanying text *supra.*

[156] 5 WATERS AND WATER RIGHTS § 452.1, at 502; text accompanying note 36 *supra.*

ought to run, as it has used to run," has been applied by the Mississippi Supreme Court in watercourse cases from 1875 to the present.[157] The court has been consistent in upholding the rights of riparian owners to the uninterrupted use of a watercourse. A watercourse cannot be obstructed unless it leaves its original channel or is otherwise diverted,[158] or unless the diverting party has acquired a prescriptive right to do so;[159] and, once the watercourse has become established, it cannot be drained by an adjacent owner.[160] In this area, unlike most areas of surface water rights, the law is reasonably predictable, and the rights of both upper and lower owners are zealously guarded.

In *Lauck v. Gilbert,*[161] an upper riparian owner obstructed a natural drain with logs and trash, impeding the flow of water through the drain and damaging the lands of the upper owner. If these drains were watercourses, they could not be blocked; but, if the case had come within the modified common-enemy rule of *Holman v. Richardson*[162] or the overflow rule of *Indian Creek,*[163] the waters could have been obstructed if the obstruction was reasonable. The court, however, held that one of the obstructed drains was a natural watercourse and that a prescriptive right existed in the lower owner to have water flow through those drains which were not natural watercourses.[164] The drains could not be obstructed, and an injunction and damages were proper remedies.[165]

---

[157] *E.g.,* Lauck v. Gilbert, 252 Miss. 371, 173 So. 2d 626 (1965); Liles v. Cawthorn, 78 Miss. 559, 29 So. 834 (1901); Ferris v. Wellborn, 64 Miss. 29, 8 So. 165 (1886); Mississippi Cent. R.R. v. Mason, 51 Miss. 234 (1875).

[158] *Compare* Lauck v. Gilbert, 252 Miss. 371, 173 So. 2d 626 (1965); Masonite Corp. v. Windham, 210 Miss. 90, 48 So. 2d 622 (1950); Illinois Cent. R.R. v. Wright, 135 Miss. 435, 100 So. 1 (1924); Davis v. Hambrick, 125 Miss. 859, 88 So. 511 (1921); Liles v. Cawthorn, 78 Miss. 559, 29 So. 834 (1901); Mississippi & T.R.R. v. Archibald, 67 Miss. 38, 7 So. 212 (1890); Ferris v. Wellborn, 64 Miss. 29, 8 So. 165 (1886); Mississippi Cent. R.R. v. Mason, 51 Miss. 234 (1875), *with* Palmer v. Massengill, 214 Miss. 379, 58 So. 2d 918 (1952); Yazoo & M.V. Ry. v. Brown, 99 Miss. 88, 54 So. 804 (1911).

[159] Person v. Roane, 218 Miss. 621, 67 So. 2d 535 (1953) (prescriptive easement does not arise if use is by permission); Pompey Lake Drainage Dist. v. McKinney Lake Drainage Dist., 136 Miss. 168, 99 So. 387 (1924) (if entire watercourse is changed by artificial channel and continues changed for the prescriptive period, full riparian rights attach; but, if only part of the course is changed, use as to that part is limited by the extent and type of use during the prescriptive period); Crumbaugh v. Mobile & O.R.R., 105 Miss. 485, 62 So. 233 (1913) (right to obstruct watercourse and floodland may arise by prescription). *See also* Miss. Code Ann. § 51-3-7(2) (1972).

[160] Alcorn v. Sadler, 66 Miss. 221, 5 So. 694 (1889).

[161] 252 Miss. 371, 173 So. 2d 626 (1965).

[162] *See* notes 118 through 128 and accompanying text *supra.*

[163] *See* notes 145 through 147 and accompanying text *supra.*

[164] 252 Miss. at 395, 173 So. 2d at 638.

[165] *Id.* at 399-400, 173 So. 2d at 640.

F. Liability of State Subdivisions for Diversion of Surface Water

The cases in this section include examples of collection and discharge of surface water,[166] impediment of surface water flow,[167] and increase in surface water flow[168] by subdivisions of the state which have been granted the power of eminent domain. Since these cases involve special rules concerning recovery of damages, they are collected here for separate discussion.

When the Mississippi constitution of 1890 was adopted, the section concerning taking of property for public use was expanded to include compensation for damaging property.[169] In the first case clearly interpreting the new section, the court stated: "The citizen must now be held, under the new provision of our fundamental law, to be entitled to due compensation for, not the taking, only, of his property for public use, but for all damages to his property that may result from works for public use."[170]

Liability under section 17 is absolute; it "requires payment for damage to private property taken for public use whether such damage be the result of negligence or not."[171] The declaration must specifically allege violation of the section or it will not apply; thus, if the plaintiff chooses to plead only negligence, then he must prove negligence.[172]

---

[166] City of Jackson v. Robertson, 208 Miss. 422, 44 So. 2d 523 (1950). *But see* Sturges v. City of Meridian, 95 Miss. 35, 48 So. 620 (1909) (city can acquire prescriptive rights).

[167] City of Meridian v. Bryant, 232 Miss. 892, 100 So. 2d 860 (1958) (city under a duty to keep drains clean); Stigall v. Sharkey County, 213 Miss. 798, 57 So. 2d 146 (1952) (county installed culvert too small to carry water).

[168] Mississippi State Highway Comm'n v. Engell, 251 Miss. 855, 171 So. 2d 860 (1965).

[169] MISS. CONST. art. 3, § 17 (1890), provides:

> Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law . . . .

See also City of Vicksburg v. Herman, 72 Miss. 211, 16 So. 434 (1894).

[170] City of Vicksburg v. Herman, 72 Miss. 211, 215, 16 So. 434, 435 (1894). The court's statement that compensation would be due for all damages appears to have been limited in subsequent cases. As stated in part V(D) *supra,* the court carved out an exception to ordinary surface water law; that is, overflow water can be diverted onto neighboring land with no liability if the diversion was reasonable. In Mississippi State Highway Comm'n v. Thomas, 202 So. 2d 925 (Miss. 1967), the court stated that it had examined the floodwater cases and found them "distinguishable." But the court did not state that the cases were inapplicable to a section 17 cause of action. Therefore, the exception has likely found its way into another area of the common law. *See* note 177 *infra.*

[171] City of Jackson v. Cook, 214 Miss. 201, 208, 58 So. 2d 498, 500-01 (1952).

[172] Crawford v. City of Meridian, 186 So. 2d 250 (Miss. 1966); City of Jackson v. Cook, 214 Miss. 201, 58 So. 2d 498 (1952) (pleadings in negligence and section 17 sufficient to invoke the section); City of Meridian v. Peavy, 188 Miss. 168, 194 So. 595 (1940); Thompson v. City of Philadelphia, 180 Miss. 190, 177 So. 39 (1937); Chidsey v. City of Pascagoula, 102 Miss. 709, 59 So. 879 (1912).

Since liability, in most cases, is absolute, the cases under section 17 often involve a question of proximate cause. For example, in *Mississippi State Highway Commission v. Engell*[173] the highway commission acquired property adjacent to the appellee's and removed sand and clay to be used as topping for a new highway. Prior to the excavation of the upper lot, surface water was slowed by vegetation and percolation. After the excavation, surface water flowed onto the lower land at an accelerated speed, carrying sand, silt, and debris. The appellee's property was damaged, and his lakes were partially filled with silt. The highway commission contended that grade, rainfall, and other construction in the area were the proximate cause of damage. The court stated that "[g]rade and rainfall existed long before the acquisition and use by [the highway commission], and no damage had resulted to appellee's property as a result thereof."[174] Although damages would have been a proper remedy, the instruction on damages in the lower court was erroneous, and the court remanded the case on that issue.[175]

Most cases in this area involve changing the grade of a street and, consequently, changing and increasing the flow of surface water.[176] A city has the right to construct and maintain streets, but not, in so doing, to direct surface water onto otherwise dry property.[177] If the improvement damages private property, damages are a proper remedy; an injunction may be granted to alleviate the damage but not to halt an improvement made in the public interest.[178]

---

[173] 251 Miss. 855, 171 So. 2d 860 (1965).

[174] *Id.* at 862, 171 So. 2d at 863.

[175] A case involving the same construction, but different damages, was also affirmed as to liability and reversed on damages. Mississippi State Highway Comm'n v. Thomas, 202 So. 2d 925 (Miss. 1967). For a thorough discussion of damages resulting from an eminent domain taking, see Jones, *Just Compensation Via Fair Market Value May Not Include the Kitchen Sink—It Could be Noncompensable*, 46 Miss. L.J. 1 (1975).

[176] *E.g.*, City of McComb v. Rodgers, 246 So. 2d 913 (Miss. 1971); Clements v. Town of Carrollton, 216 Miss. 859, 63 So. 2d 398 (1953); City of Jackson v. Cook, 214 Miss. 201, 58 So. 2d 498 (1952); City of Water Valley v. Poteete, 203 Miss. 382, 33 So. 2d 794 (1948); Cauthen v. City of Canton, 144 Miss. 471, 110 So. 123 (1926); Chidsey v. City of Pascagoula, 102 Miss. 709, 59 So. 879 (1912).

[177] City of McComb v. Rodgers, 246 So. 2d 913 (Miss. 1971). As stated in note 170 *supra*, vagrant floodwaters are very probably an exception to damages recoverable under section 17. In the area of diverting surface water into a watercourse, the court has denied liability for overtaxing the capacity of a watercourse. *See* part V(C) *supra*. Therefore, if a city changes the grade of a street and thereby diverts water into a watercourse, there is no liability under section 17 for overtaxing such a watercourse. Clements v. Town of Carrollton, 216 Miss. 859, 63 So. 2d 398 (1953).

[178] *Compare* City of McComb v. Rodgers, 246 So. 2d 913 (Miss. 1971), *with* City of Water Valley v. Poteete, 203 Miss. 382, 33 So. 2d 794 (1948).

VI. REMEDIES

According to *Lauck v. Gilbert,*[179] "[t]he authorities all agree that one whose property has been injured or destroyed by water, due to the wrongful act or omission of another, may maintain an action for the recovery of the damages sustained."[180] The complainant can recover nominal damages without proof of any special damage,[181] but he can recover special damages only if such damages are alleged in the declaration.[182] If a willful disregard of rights is involved, punitive damages may be awarded.[183] In the absence of special or punitive damages, "the measure of damages of the owner of the land is the diminution of the market value of the property if the injury is of a permanent nature, or the diminution in the rental or usable value if the injury is of a temporary nature."[184] It makes no difference that the complainant did not own the land at the time the damage began;[185] but he cannot recover for damages occurring prior to his acquisition of the property,[186] and the condition complained of must exist at the time of filing suit.[187] If the offending party has acquired a prescriptive right to continue the action resulting in damage, the complainant cannot recover damages or enjoin the action;[188] however, a complainant also can acquire prescriptive rights to have water flow in a particular manner.[189] In any case in which damages are proper, the jury must be given some guidelines as to the measure of damages,[190] and the act complained of must be a proximate cause of the damage.[191]

---

[179] 252 Miss. 371, 173 So. 2d 626 (1965).

[180] *Id.* at 393, 173 So. 2d at 637.

[181] Chapman v. Copeland, 55 Miss. 476 (1877).

[182] Broadhead v. Gatlin, 243 Miss. 386, 137 So. 2d 909 (1962).

[183] *Compare* Newton Coca Cola Bottling Co. v. Murphrey, 212 Miss. 823, 55 So. 2d 485 (1951), *with* Alabama & V. Ry. v. Daniels, 108 Miss 68, 66 So. 324 (1914).

[184] City of Oxford v. Spears, 228 Miss. 433, 439, 87 So. 2d 914, 916 (1956). *See also* Haisch v. Southaven Land Co., 274 F. Supp. 392 (N.D. Miss. 1967); Baker v. Mississippi State Highway Comm'n, 204 Miss. 166, 37 So. 2d 169 (1948).

A lessee may also recover for damages to leased property. *See* Mississippi State Highway Comm'n v. Thomas, 202 So. 2d 925 (Miss. 1967).

[185] Mississippi & T.R.R. v. Archibald, 67 Miss. 38, 7 So. 212 (1890); Chapman v. Copeland, 55 Miss. 476 (1877).

[186] Mississippi Cent. R.R. v. Magee, 93 Miss. 196, 46 So. 716 (1908).

[187] Cauthen v. City of Canton, 144 Miss. 471, 110 So. 123 (1926).

[188] Person v. Roane, 218 Miss. 621, 67 So. 2d 534 (1953); Cresson v. Louisville & N.R.R., 166 Miss. 352, 146 So. 462 (1933); Harvey v. Illinois Cent. R.R., 111 Miss. 835, 72 So. 273 (1916); Crumbaugh v. Mobile & O.R.R., 105 Miss. 485, 62 So. 233 (1913).

[189] Lauck v. Gilbert, 252 Miss. 371, 173 So. 2d 626 (1965).

[190] Mississippi State Highway Comm'n v. Thomas, 202 So. 2d 925 (Miss. 1967); Mississippi State Highway Comm'n v. Engell, 251 Miss. 855, 171 So. 2d 860 (1965); Alabama Great S.R.R. v. Broach, 238 Miss. 618, 119 So. 2d 923 (1960).

[191] Illinois Cent. R.R. v. Wright, 135 Miss. 435, 100 So. 1 (1924); Davis v. Hambrick, 125 Miss. 859, 88 So. 511 (1921).

Damages to crops present special problems. If a landowner recovers damages for land which has been rendered unfit for cultivation, he may not recover for loss of crops or for a reduction in his harvest.[192] If he chooses to recover damages to crops only, however, he may do so[193] provided that the planting did not occur after it was evident that the land had been rendered unfit.[194]

In addition to damages, an injunction is a proper remedy, and often the only effective one.[195] An injunction can be issued even if the costs of restoring property exceed simple damages.[196] The major problem which most injunctions have presented is a lack of specificity; the defendant must be told with reasonable certainty what he is expected to do.[197] Unfortunately, there is no standard of "reasonable certainty" which can be applied uniformly; the facts in each case determine the reasonableness of the injunction's wording. If an injunction, not damages, is sought, the case may be proper for multiple complainants.[198]

VII. Conclusion

It is clear from the foregoing discussion that Mississippi follows a modified version of the common-enemy rule, allowing a change in the flow of diffused surface waters where the change causes no unnecessary harm. This rule apparently has two exceptions: vagrant floodwaters and overtaxing the capacity of a watercourse. Even in those areas the court

---

[192] The declaration claims certain other damages for injury to crops upon the land, but the evidence discloses that this damage resulted, not to the crops directly, but that by reason of excessive water put upon the land, it was rendered incapable of producing full crops, as it had done before. The plaintiff has, therefore, been awarded double damages for the injury. He has recovered damages for injury to land, and damages because the land as injured failed to produce full crops. For this the judgment must be reversed.

Illinois Cent. R.R. v. Miller, 68 Miss. 760, 764-65, 10 So. 61, 62 (1891); *see* Yazoo & M.V. Ry. v. Jones, 118 Miss. 224, 79 So. 65 (1918); Yazoo & M.V. Ry. v. Darden, 34 So. 386 (Miss. 1903).

[193] Stigall v. Sharkey County, 213 Miss. 798, 57 So. 2d 146 (1952).

[194] Lauck v. Gilbert, 252 Miss. 371, 173 So. 2d 626 (1965).

[195] Shattles v. Field, Brackett & Pitts, Inc., 261 So. 2d 795 (Miss. 1972); Hood v. Foster, 194 Miss. 812, 13 So. 2d 652 (1943); Moss v. Jourdan, 129 Miss. 598, 92 So. 689 (1922).

[196] Shattles v. Field, Brackett & Pitts, Inc., 261 So. 2d 795 (Miss. 1972).

[197] *Id.*, Lauck v. Gilbert, 252 Miss. 371, 173 So. 2d 626 (1965); Illinois Cent. R.R. v. George, 241 Miss. 233, 130 So. 2d 260 (1961).

[198] Yazoo & M.V. Ry. v. McConnell, 127 Miss. 581, 90 So. 321 (1922); Tribette v. Illinois Cent. R.R., 70 Miss. 182, 12 So. 32 (1892). For a discussion of multiparty litigation in Mississippi, see Comment, *Federal and State Class Actions: Developments and Opportunities*, 46 Miss. L.J. 39, 55-67 (1975).

has injected a reasonableness standard, balancing benefits to upper owners against harm to lower owners. The common-enemy rule, with its modifications and exceptions, has become unpredictable and difficult to apply. The court, in seeking equity, is moving close to a reasonable-use rule. If that rule were wholeheartedly adopted, the court could avoid the harshness of the common-enemy rule and at the same time simplify decisions; there would be no need for numerous exceptions. The reasonable-use rule has the distinct advantage of offering a jury concrete guidelines to apply uniformly in all cases.[199] It incorporates the spirit of the exceptions to the common-enemy rule without the awkwardness of language inherent in those exceptions.

Henry A. Schutz III
Jim Barnette Tohill

---

[199] *See* note 67 and accompanying text *supra.*

STANDING TO CONTEST ILLEGAL SEARCHES AND SEIZURES

The fourth amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." Section 23 of article III, Mississippi Constitution of 1890, also provides: "The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search . . . ." To fully implement these fundamental rights, the United States Supreme Court and the Supreme Court of Mississippi have developed the "exclusionary rule"[1] which prohibits the use of unconstitutionally obtained evidence against a defendant in a criminal trial. A defendant may avail himself of this remedy by a motion to suppress the illegally seized evidence.[2] Relying solely on the illegality of the search or seizure, however, is not enough; the movant must also establish that he is the proper party to raise the claim of illegality.[3] If the defendant is the proper party, he is said to have "standing"; if not, the fruits of the illegal search and seizure may be used in evidence against him.[4]

If, as the courts have announced, the primary reason for the exclusionary rule is to deter illegal police conduct and to prevent the government from profiting from its own illegal conduct,[5] why should the rule be limited by the doctrine of standing? The answer may be found in a combination of historical precedents and policy considerations.[6] This comment will discuss the precedents and policies which underlie the doctrine of standing and attempt to answer the following questions: What considerations are important to the determination of whether a defendant will be allowed to contest a particular search and seizure? What relationship must a defendant establish either to the premises searched or to the property seized in order to have standing? What is

---

[1] Weeks v. United States, 232 U.S. 383 (1914), applied to the states in Mapp v. Ohio, 367 U.S. 643 (1961). The Mississippi rule was developed independently in Tucker v. State, 128 Miss. 211, 90 So. 845 (1922), based on an interpretation of the state's constitution.

[2] *See* FED. R. CRIM. P. 41(e).

[3] *See* Grove, *Suppression of Illegally Obtained Evidence: The Standing Requirement on Its Last Leg*, 18 CATH. U. AM. L. REV. 150 (1968). *See also* C. MCCORMICK, EVIDENCE § 179 (E. Cleary ed. 1972) [hereinafter cited as MCCORMICK].

[4] Standing is but a part of the larger concept of justiciability, which stems from article III of the United States Constitution. General standing, requiring that each party have an adversary interest in the outcome of a case, is constitutional in origin. Specific standing—whether a party can raise a certain issue in a lawsuit—is more often the product of policy decisions. *See* Grove, *supra* note 3, at 151-52. *See also* 15 U.C.L.A.L. REV. 1060, 1062 n.17 (1966).

[5] *See* MCCORMICK, *supra* note 3, § 179.

[6] Grove, *supra* note 3, at 152.

the present constitutional standard for standing, and how has it been interpreted in Mississippi? May the doctrine of standing be reconciled with the purpose of the exclusionary rule? Should Mississippi maintain or modify the doctrine as pronounced by its highest court?

I. STANDING: THE CONCEPT AND RATIONALE

Standing has been defined in its general context as the "right of a particular individual to raise certain issues before a court of law."[7] The doctrine requires one first to show that he has been injured by the asserted unconstitutional action before he will be allowed access to the courts to vindicate his rights.[8] In its search and seizure context, the doctrine requires a defendant to establish that he has suffered personal, financial, or some other direct injury from the illegal conduct.[9] A defendant will not be allowed to complain that another's rights have been violated;[10] fourth amendment rights are personal and cannot be asserted vicariously.[11]

The doctrine of standing is an outgrowth of the ancient law of trespass to real property.[12] The right to object to the introduction of illegally seized evidence was available only to a defendant, claiming a possessory or proprietary right in the property seized or the premises searched.[13] Subtle property distinctions[14] were used to deny standing to guests,[15] lessees,[16] licensees,[17] lessors,[18] passengers,[19] and all others who

---

[7] 15 U.C.L.A.L. REV. 1060, 1062 n.17 (1966).

[8] Comment, *Standing Requirement of the Fourth Amendment—Anachronism or Necessity?*, 6 IDAHO L. REV. 131, 131-32 (1969).

[9] Grove, *supra* note 3, at 152.

[10] As an illustration:

> If evidence which has been obtained by a violation of the fourth amendment rights of *A* is sought to be used against *A* at trial, *A* has standing to invoke the exclusionary rule. But if that evidence is sought to be used against *B*, the federal courts uniformly hold that *B* does not have standing to raise the issue of the illegal search and seizure *directed* at *A*.

15 U.C.L.A.L. REV. 1060, 1063 (1966).

[11] *See* text accompanying notes 66 through 68 *infra*.

[12] *See* White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333, 338 (1970).

[13] *See, e.g.*, United States v. Chieppa, 241 F.2d 635 (2d Cir. 1957); Shurman v. United States, 219 F.2d 282 (5th Cir. 1955); Mabee v. United States, 60 F.2d 209 (3d Cir. 1932); Ball v. State, 194 So. 2d 502 (Miss. 1967); McLemore v. State, 178 Miss. 525, 172 So. 139 (1937); Ross v. State, 140 Miss. 367, 105 So. 846 (1925); Falkner v. State, 134 Miss. 253, 98 So. 691 (1924). *See also* Grove, *supra* note 3, at 169; Weeks, *Standing to Object in the Field of Search and Seizure*, 6 ARIZ. L. REV. 65, 66-71 (1964); White & Greenspan, *supra* note 12, at 338-39; 48 J. URBAN L. 542, 545 (1971).

[14] *See, e.g.*, Jones v. United States, 362 U.S. 258, 266 (1960).

[15] *E.g.*, Lee v. City of Oxford, 134 Miss. 647, 99 So. 509 (1924).

[16] *E.g.*, Ball v. State, 194 So. 2d 502 (Miss. 1967).

[17] *E.g.*, Falkner v. State, 134 Miss. 253, 98 So. 691 (1924).

could not claim the requisite interest in the property or premises.[20] This approach to the standing doctrine existed in Mississippi[21] until 1969 when the state's highest court, in *Canning v. State*,[22] applied the fourth amendment[23] and ostensibly swept away the old property distinctions.[24]

If the purpose of the exclusionary rule is to deter unconstitutional police practices,[25] the standing doctrine's purpose may be said to limit the applicability of the rule and to ensure the conviction of the guilty.[26] Each time the exclusionary rule is applied "there is a social cost directly proportional to the relevance of the excluded evidence. This social cost at some point must limit the scope of the rule."[27] The standing doctrine provides this limiting effect.

> [The exclusionary] rule is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease. . . .
>
> As the exclusionary rule is applied time after time, it seems that its deterrent efficacy at some stage reaches a point of diminishing returns, and beyond that point its continued application is a public nuisance.[28]

---

[18] *E.g.*, McBride v. State, 221 Miss. 508, 73 So. 2d 154 (1954).

[19] *E.g.*, Slyter v. State, 246 Miss. 402, 149 So. 2d 489 (1963).

[20] *See* White & Greenspan, *supra* note 12, at 338-39.

[21] *See* Lee v. City of Oxford, 134 Miss. 647, 99 So. 509 (1924).

[22] 226 So. 2d 747 (Miss. 1969).

[23] Heretofore, standing was resolved solely on the basis of section 23 of the Mississippi Constitution of 1890. In *Canning*, the court held itself bound by the "new" constitutional standards announced in Jones v. United States, 362 U.S. 257 (1960), and Mancusi v. DeForte, 392 U.S. 364 (1968). *See* text accompanying notes 93 through 100 *infra*.

[24] Justice Anderson, writing for the court in Polk v. State, 167 Miss. 506, 142 So. 480 (1932), and dissenting in Brown v. State, 192 Miss. 314, 5 So. 2d 426 (1942), questioned the court's concern with property distinctions:

> The question is whether or not under Section 23 of our Constitution and statutes the State had the right to search the premises where the illegal business was being carried on in whole or in part without a search warrant, where the defendant has neither the title to the property nor right to possession as against the true owner. Clearly it seems to me that question ought to be answered in the negative . . . . The State is not concerned with the title to the property; it is the unlawful business conducted on the property.

Id. at 320-21, 5 So. 2d at 428. The court felt obliged as late as 1965 to reiterate the doctrine. Craft v. State, 254 Miss. 413, 181 So. 2d 140 (1965).

[25] *See* text accompanying note 5 *supra*.

[26] 15 U.C.L.A.L. REV. 1060 (1966). Referring to the illustration, note 10 *supra*:

> In the first case—where *A* can object to the introduction of evidence obtained by violation of his rights—the public's interest in protecting constitutional rights is served; in the second—where *B* is denied standing to object to the violation of *A's* rights—its interest in convicting the guilty prevails.

15 U.C.L.A.L. REV. 1060, 1063 (1966) (footnotes omitted).

[27] White & Greenspan, *supra* note 12, at 334.

[28] Amsterdam, *Search, Seizure, and Section 2255; A Comment*, 112 U. PA. L. REV. 378, 389 (1964).

In the opinion of some, broader application of the exclusionary rule would have only a marginal effect in deterring illegal police practices.[29]

II. The Constitutional Standard

The United States Supreme Court began a partial reassessment of the standing doctrine and its requirement for either a possessory or a proprietary interest in *United States v. Jeffers*.[30] The police, without a warrant, conducted a search of a hotel room rented and occupied by the defendant's two aunts, and seized a quantity of narcotics. Neither Jeffers nor his aunts were present during the search, nor was Jeffers staying in the room. The evidence seized was introduced at trial over his objections. The court of appeals reversed his conviction;[31] the Supreme Court affirmed. Countering the government's contention that the search had invaded no privacy of the defendant and thus he had no standing, the Court remarked that the search of the room and the seizure of the contraband were not, as the government claimed, isolated incidents, but were "bound together by one sole purpose—to locate and seize the narcotics of respondent."[32] The Court held that the petitioner should be granted standing unless he was unable to claim any property interest in the seized items.[33] Although the Court retained the requirement for a possessory interest in the objects seized, *Jeffers*' significance was its implication that standing would be granted where the search and seizure were carried out with the objects to be seized and the identity of the possessor in mind.

Nine years later *Jones v. United States*[34] was decided. It remains the predominant case on standing.[35] Jones was convicted of violating federal narcotics laws[36] after contraband drugs and paraphernalia were

---

[29] Weeks, *supra* note 13, at 79; White & Greenspan, *supra* note 12, at 336. *See also* Alderman v. United States, 394 U.S. 165, 188 n.1 (1969) (Harlan, J., concurring, dissenting in part).

[30] 342 U.S. 48 (1951).

[31] 187 F.2d 498 (D.C. Cir. 1950), *aff'd*, 342 U.S. 48 (1951).

[32] 342 U.S. at 52.

[33] The government had urged that one could acquire no fourth amendment rights in narcotics because Congress had declared such to be contraband. The Court interpreted this to mean that Congress merely intended to assist in the forfeiture of such substances in order to prevent their spread, rather than abolishing the exclusionary rule in such situations. *Id.* at 52-54.

[34] 362 U.S. 257 (1960).

[35] *See generally* McCormick, *supra* note 3; Weeks, *supra* note 13, at 66; White & Greenspan, *supra* note 12, at 338.

[36] The Court noted that both statutes under which Jones was convicted would permit conviction upon proof of his possession of the narcotics, thus "possession was the basis of the Government's case against petitioner." 362 U.S. at 258.

seized pursuant to the execution of the search of an apartment in which Jones was found.[37] Jones challenged the warrant, and the government countered that he had no standing since he alleged neither ownership of the seized articles nor an interest in the apartment greater than that of an "invitee or guest."[38] Mr. Justice Frankfurter, writing for the Court, said the petitioner's standing would have to be decided with reference to rule 41(e) of the Federal Rules of Criminal Procedure,[39] the issue being whether Jones was a "person aggrieved by an unlawful search and seizure" under the provisions of the rule. One does not qualify as a "person aggrieved" unless he is

> a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.[40]

Justice Frankfurter recognized that the courts have required one asserting an unlawful search or seizure "either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched."[41] Since charges like the ones faced by Jones may be established by proof of possession alone, the defendant finds himself facing a dilemma from which there has been no escape: if he asserts the requisite property interest, he has admitted the possession of the incriminating contraband; if he denies it, he has no standing. Justice Frankfurter found the dilemma no longer unavoidable, for two separate lines of thought sustained the defendant's standing in the present case:

> (1) The same element in this prosecution which has caused a dilemma,

---

[37] Federal narcotics officers, executing a search warrant for the premises in which Jones was found, saw him place his hand outside the apartment through an open window and put it in an awning in which narcotics were later found. While the opinion does not make it clear, it is supposed that Jones was charged with constructive possession of the narcotics. *Cf.* Hamburg v. State, 248 So. 2d 430 (Miss. 1971).

[38] 362 U.S. at 259. Jones did have a key to the apartment, had left some articles there, and came and went as he pleased. He did not, however, pay any rent.

[39] Rule 41(e) reads in part:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed.

FED. R. CRIM. P. 41(e).

[40] 362 U.S. at 261.

[41] *Id.*

> *i.e.*, that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged. (2) Even were this not a prosecution turning on illicit possession, the legally requisite interest in the premises was here satisfied, for it need not be as extensive a property interest as was required . . . below.[42]

The government is thus estopped from denying standing to a defendant in this situation. It can no longer base its conviction on the defendant's possession of the contraband at the time of the search, while simultaneously entering the fruits of the search into evidence on grounds not requiring possession at the time of the search.[43] "It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions . . . by the Government."[44] If proof of possession is sufficient to sustain the charge, the defendant will be accorded automatic standing to contest the search and seizure.

The Court also found that Jones' testimony in support of the motion to suppress was sufficient to establish him as a "person aggrieved" under rule 41(e) due to his "sufficient interest in the premises."[45] Justice Frankfurter stated that the fact that the petitioner had neither ownership, right to possession, nor dominion over the apartment searched was immaterial. Historical distinctions evolved from private property law, "often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards."[46] No just interest in effective law enforcement will be harmed

> by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched.[47]

Justice Frankfurter thus announced a two-pronged approach to standing: Automatic standing will be granted either when proof of possession is sufficient to convict or where the defendant was legitimately on the premises searched.

The Court was again forced to define the parameters of the standing

---

[42] *Id.* at 263.
[43] *Id.*
[44] *Id.* at 263-64.
[45] *Id.* at 265.
[46] *Id.* at 266.
[47] *Id.* at 267.

doctrine in *Simmons v. United States*.[48] Three defendants, Williams and petitioners Simmons and Garrett, were convicted of the armed robbery of a savings and loan association. A warrantless search of the basement of Williams' mother's house disclosed a suitcase containing incriminating evidence. Garrett, in order to establish standing, testified at the suppression hearing that the suitcase was similar to one which he owned and that he was the owner of clothing found inside the case. The trial court denied his motion to suppress; his testimony at the suppression hearing was admitted against him. Certiorari was granted to consider, *inter alia*, Garrett's claim that the testimony he had given at the suppression hearing was admitted in violation of his constitutional rights.[49] Speaking for the majority, Mr. Justice Harlan explained that while the "dilemma" encountered in *Jones* "is most extreme in prosecutions for possessory crimes,"[50] the same "Hobson's choice" may be faced in the context of a nonpossessory crime, for a defendant still may be deterred from asserting his rights by the knowledge that his admissions at the suppression hearing may be used against him.

> In such circumstances, a defendant with a substantial claim for the exclusion of evidence may conclude that the admission of the evidence, together with the Government's proof linking it to him, is preferable to risking the admission of his own testimony connecting himself with the seized evidence.[51]

The Court held, therefore, that when a defendant testifies in support of a motion to exclude evidence on the basis of the fourth amendment, his testimony may not be admitted over his objection on the issue of his guilt.[52]

The Court was confronted with another question of standing in *Mancusi v. DeForte*.[53] Union records were seized from an office DeForte shared with other union officials and were used against him on charges of conspiracy, coercion and extortion. DeForte had been present during

---

[48] 390 U.S. 377 (1968).

[49] *Id.* at 381-82.

[50] *Id.* at 391.

[51] *Id.* at 393.

[52] *Id.* at 394. Justice Black vehemently dissented:

> The consequence of the Court's holding . . . is that defendants are encouraged to come into court, either in person or through other witnesses, and swear falsely that they do not own property, knowing at the very moment they do so that they have already sworn precisely the opposite in a prior court proceeding. This is but to permit lawless people to play ducks and drakes with the basic principles of criminal law.

Id. at 398.

[53] 392 U.S. 364 (1968).

the search and had objected to it. The Supreme Court, Justice Harlan speaking for the six-man majority, reasoned that DeForte's "expectations of privacy" had been invaded.[54] Pointing out that the seized papers belonged not to DeForte but to the union, the defendant had standing only "if, as to him, the search violated the 'right of the people to be secure in their . . . houses . . . .' "[55]

Since "houses" may be equated to commercial premises, and since *Jones* gave standing to anyone "legitimately on the premises," and *Katz v. United States*[56] made it clear that the protections of the fourth amendment depend not on a property right in the premises invaded, but "upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion,"[57] the issue of standing could be decided with reference to the question whether under the circumstances DeForte's office should be protected.[58] Although DeForte's office was not private in absolute terms since he shared it with other union officers, he did expect only those officers and persons approved by those officers to have access to the records.[59] The Court compared the facts of *Jones* to those of *Mancusi* and determined that the "expectation of privacy" was the same.[60] Based on DeForte's "reasonable expectations of privacy," the Court held that he had standing regardless of the fact that the seized papers belonged not to him but to his union employer.[61]

The Court squarely faced the issue of "derivative standing"[62] for the

---

[54] Justice Harlan felt it necessary to preface his opinion with a statement of what *Mancusi* was *not*:

> [T]his is not a case in which it is necessary to decide whether the traditional doctrine that Fourth Amendment rights "are personal rights, and . . . may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure," . . . should be modified.

Id. at 366, *quoting* Simmons v. United States, 390 U.S. 377, 389 (1968).

[55] 392 U.S. at 367.

[56] 389 U.S. 347 (1967).

[57] 392 U.S. at 368.

[58] *Id.*

[59] *Id.* at 369.

[60] *Id.* at 370.

[61] Justice Black again dissented, arguing that the seized papers did not belong to DeForte and that the logical extension of the present holding would do away with standing entirely. He opposed the legitimately-on-the-premises test and would substitute one in which standing would be granted only if the search were "directed at" the defendant personally. *Id.* at 372-77.

[62] The term comes from G. SHADOAN, LAW AND TACTICS IN FEDERAL CRIMINAL CASES 38 (1964). "Automatic" standing also has been called "umbrella defense." Grove, *supra* note 3, at 173 n.144. "Automatic" standing is discussed in part III(A) *infra*. Justice Black noted that, until Mancusi v. DeForte, 392 U.S. 364 (1968),

> a defendant on trial for a crime [had] no standing . . . to object to the use of

first time in *Alderman v. United States*.[63] The issues to be resolved were:

> [I]f illegal surveillance took place at the premises of a particular defendant.
>
> (a) Does that defendant have standing to object to the use against him of any or all information obtained from the illegal surveillance, whether or not he was present on the premises or party to the overheard conversation?
>
> (b) Does a codefendant have standing to object to the use against him of any or all information obtained from the illegal surveillance, whether or not he was present on the premises or party to the overheard conversation?[64]

The Court was urged to adopt the position that evidence obtained by illegal wiretapping and, therefore, inadmissible against one defendant or conspirator should also be inadmissible against a codefendant or coconspirator.[65] Mr. Justice White, in the majority opinion, began by restating the principle that fourth amendment violations can be urged successfully only by those whose rights were violated by the contested conduct itself, not by those "aggrieved solely by the introduction of damaging evidence."[66] No special standing has been accorded codefendants and coconspirators. Using the "person aggrieved"[67] language from *Jones*, a "victim of the search" will be heard only if he himself is a victim of an invasion of privacy.[68] The deterrent aim of the exclusionary rule has no direct bearing on this situation, reasoned Justice White, since the fourth amendment does not demand deterrence at all costs. The Court held that unlawfully overheard conversations of a

---

> [evidence] against him on the ground that [evidence] belonging to someone else, had been taken from the owner in violation of the Fourth Amendment.

Id. at 372.

[63] 394 U.S. 165 (1969), together with the companion cases of *Ivanov v. United States* and *Butenko v. United States*.

[64] *Id.* at 170 n.4. The issues created by these fact situations are:

> (3) What standards are to be applied in determining whether each petitioner has standing to object to the use against him of the information obtained from the electronic surveillance of petitioner Alderisio's place of business? More specifically, does petitioner Alderisio have standing to object to the use of any or all information obtained from such electronic surveillance whether or not he was present on the premises or a party to a particular overheard conversation? Also, does petitioner Alderman have standing to object to the use against him of any or all information obtained from the electronic surveillance of petitioner Alderisio's business establishment?

Id. at 169 n.2.

[65] *Id.* at 171.

[66] *Id.* at 172.

[67] Jones v. United States, 362 U.S. 257, 261 (1960).

[68] 394 U.S. at 173-74.

petitioner himself or conversations occurring on his premises, whether or not he was present or participating, may be excluded.[69] Those who are not recorded in the intercepted conversation or who have no relationship to the premises where the intercept occurred will be denied standing.[70]

Justice Harlan took issue with the majority opinion, contending that persons, not places, should be protected in conversational privacy.[71] He asserted that privacy is a personal right and thus should not be used to grant standing to a property owner not participating in the intercepted conversation;[72] conversely, a person's private conversations *should* be protected.[73] Justice Fortas would have extended the majority's reasoning to grant standing to anyone who was the "target of the search."[74] The Court returned to the problem of derivative standing in *Brown v. United States*[75] and implied that *Alderman* should be restricted to its wiretapping context. It mentioned *Alderman* only for the proposition that fourth amendment rights are personal and cannot be asserted vicariously.[76] In this latest standing pronouncement, the Court dealt with a situation in which the petitioners were charged with conspiracy and interstate transportation of stolen property[77] for having sold goods pilfered in Ohio to a storeowner in Kentucky. The Kentucky store was searched pursuant to a defective warrant and the goods seized were introduced into evidence against the two petitioners and the storeowner.[78] The Court, in a unanimous opinion by Chief Justice Burger, denied petitioners' claim of "automatic standing" under *Jones*,[79] inasmuch as the defendants:

> (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.[80]

---

[69] *Id.* at 176.

[70] *Id.*

[71] *Id.* at 193 (concurring, dissenting in part).

[72] *Id.* at 193-94.

[73] *Id.* at 195.

[74] *Id.* at 207-09 (concurring, dissenting in part).

[75] 411 U.S. 223 (1973).

[76] *Id.* at 230.

[77] 18 U.S.C. §§ 371, 2314 (1970).

[78] Charges against the storeowner were severed for trial. 411 U.S. at 226. It is interesting to note that at the time of the search complained of, both defendants were in custody in Ohio and thus could not possibly have been on the premises when searched. This poses the question of whether the government could arrest first and search later to bypass the standing issue.

[79] *Id.* at 227.

[80] *Id.* at 229.

Chief Justice Burger distinguished *Simmons*, relied on by the defendants for the proposition that proof of their possession of the stolen goods was sufficient to establish their standing where possession was "an essential element of the offense . . . ."[81] The "dilemma" which granted standing in such cases no longer exists under the current interpretation of the Constitution which precludes introduction at trial of testimony given during a suppression hearing. Therefore, the petitioners could have asserted a possessory interest in the goods at the store without any danger of damage to themselves. This they failed to do.[82] The petitioners were not on the premises at the time of the search (having been in custody in Ohio), nor did they allege any possessory interest in the seized articles; therefore, they could not be heard to claim any violation of their constitutional rights.[83] The Court returned one last time to the question of automatic standing:

> [W]e do not decide that this vice of prosecutorial self-contradiction warrants the continued survival of *Jones*' "automatic" standing now that our decision in *Simmons* has removed the danger of coerced self-incrimination. We simply see no reason to afford such "automatic" standing where, as here, there was no risk to a defendant of either self-incrimination or prosecutorial self-contradiction. . . . [P]etitioners had no standing to contest the defective warrant used to search Knuckles' store; they could not then and cannot now rely on the Fourth Amendment rights of another.[84]

III. Applying the Standard

A. *Automatic Standing*[85]

Jones v. United States[86] would grant standing to anyone charged

---

[81] Simmons v. United States, 390 U.S. 377, 390 (1968).

> That case involved (a) a seizure of contraband narcotics, (b) a defendant who was present at the seizure, and (c) an offense in which the defendant's possession of the seized narcotics at the time of the contested search and seizure was a critical part of the Government's case.

411 U.S. at 227 (footnote omitted).

[82] 411 U.S. at 228. The Court pointed out that the indictment was "carefully limited" to a period *before* the search. *Id.* at 229.

[83] *Id.* at 229-30. The facts of this case did not lend themselves to a claim of automatic standing, because

> [t]he vice of allowing the Government to allege possession as part of the crime charged, and yet deny that there was possession sufficient for standing purposes is not present. The government cannot be accused of taking "advantage of contradictory positions."

Id. at 229.

[84] *Id.* at 229-30.

[85] *See generally* Grove, *supra* note 3, at 156-62; White & Greenspan, *supra* note 12, at 340-44; Comment, *supra* note 8, at 139-40; Comment, *Standing to Object to an Unlawful Search and Seizure*, 1965 Wash. U.L.Q. 488, 492-97.

[86] 362 U.S. 257 (1960).

with an offense established by proof of possession alone,[87] or where possession was an essential element of the offense charged.[88] While the necessity for the doctrine recently has been questioned,[89] it still appears to be a viable theory on which to base standing—a theory which requires no invasion of the defendant's privacy.[90] Automatic standing is encountered in four basic situations: contraband per se, derivative contraband, fruits of a theft, and evidentiary items.[91]

1. Contraband Per Se

Contraband per se is any item which, by its nature, may not be possessed without special permission, such as narcotics and certain dangerous weapons.[92] In *Canning v. State*[93] the defendant was charged with possession of narcotics after a warrantless search of an acquaintance's apartment turned up both marijuana and some articles which connected the defendant with the premises.[94] The Mississippi Supreme Court held that it was bound by *Jones v. United States*,[95] "possession on the basis of which petitioner is to be and was convicted suffices to give him standing under any fair and rational conception of . . . Rule 41(e)."[96] In commenting on the second rationale of *Jones*, the court stated that the defendant had a "sufficient interest in the premises to establish [her] as a 'person aggrieved' by [the] search."[97] A person no longer needs to establish any proprietary or possessory interest in the searched premises.[98] The long line of Mississippi cases requiring an interest in the place searched or the thing seized in order to confer standing[99] is no longer valid; neither are the cases denying protection to visitors.[100]

---

[87] *See* text accompanying notes 41 through 44 *supra*.

[88] *See* Brown v. United States, 411 U.S. 223, 229 (1973); text accompanying notes 80 & 81 *supra*.

[89] *See, e.g.,* Brown v. United States, 411 U.S. 223, 229-30 (1973).

[90] Grove, *supra* note 3, at 156 n.26.

[91] Comment, *Standing to Object, supra* note 85, at 493-97.

[92] Grove, *supra* note 3, at 158 n.45.

[93] 226 So. 2d 747 (Miss. 1969).

[94] Some articles of clothing and a check made out to the defendant were found during the search of the apartment. After her arrest, particles of marijuana were found adhering to the defendant's clothing. This second search was made subsequent to the defendant's illegal arrest. *Id.* at 749.

[95] 362 U.S. 257 (1960).

[96] 226 So. 2d at 751, *quoting* Jones v. United States, 362 U.S. 257, 264 (1960).

[97] *Id.*

[98] *Id.* at 752.

[99] Slyter v. State, 246 Miss. 402, 149 So. 2d 489 (1963); Rose v. State, 222 Miss. 699, 76 So. 2d 835 (1955); McBride v. State, 221 Miss. 508, 73 So. 2d 154 (1954); Brown v. State, 192 Miss. 314, 5 So. 2d 426 (1942); McLemore v. State, 178 Miss. 525, 172 So. 139 (1937); Pickett v. State, 155 Miss. 386, 124 So. 364 (1929); Ross v. State, 140 Miss. 367, 105 So. 846 (1925); Lee v. City of Oxford, 134 Miss. 647, 99 So. 509 (1924). *But cf.* Watkins v. State, 262 So. 2d 422 (Miss. 1972), *cert. denied*, 410 U.S. 958 (1973).

Soon after *Canning*, the court decided *Fuller v. State*.[101] Acting with a search warrant, officers searched an apartment shared by the defendant's girlfriend and found a matchbox of marijuana. When the defendant and his girlfriend returned from a date, police arrested and searched him. The court simply held, "*Canning* is dispositive,"[102] and on that authority, granted the defendant standing to object to the seized evidence.[103] The search of the apartment was illegal,[104] even though the defendant had not been present during the search and had only a tenuous connection with the apartment. By its reference to *Canning*, the court inferred that it was relying on the automatic standing rule of *Jones*, especially since the defendant was charged with possession of an illegal substance.[105]

Mapp v. United States[106] dispels any doubts as to whether one needs some relationship to the premises searched in order to avail himself of the automatic standing rule. Police observed the defendant, a known narcotics dealer, visit an apartment with a package in his hand and leave without it. Mapp was arrested after a search of the apartment revealed that the package contained narcotics. Although the government did not contest Mapp's standing to object to the seizure, the Second Circuit felt compelled to address the issue. After commenting that Mapp clearly had been the "target of the search,"[107] the court concluded that since possession was an "essential element" of the alleged offense, under *Simmons* and *Jones*, he fell "within the category of persons given standing for Fourth Amendment purposes . . . ."[108]

2. Derivative Contraband

Derivative contraband is not illegal per se, but the circumstances

---

[100] Barton v. State, 165 Miss. 355, 143 So. 861 (1932). *See also* Ball v. State, 194 So. 2d 502 (Miss. 1967).

[101] 230 So. 2d 213 (Miss. 1970).

[102] *Id.* at 214.

[103] The opinion reveals that Fuller had some articles in the apartment and had visited there numerous times. Although the search of the apartment was made under authority of a warrant, "the search as to him was illegal." *Id.*

[104] *Id.*

[105] *Cf.* Kishel v. State, 287 So. 2d 414 (Fla. Dist. Ct. App. 1974); Ferguson v. State *ex rel.* Biggers, 250 So. 2d 634 (Miss. 1971); Hamburg v. State, 248 So. 2d 430 (Miss. 1971). *Compare* Brown v. United States, 411 U.S. 223 (1973), *with* Freeland v. State, 285 So. 2d 895 (Miss. 1973). *See also* State v. Dias, 470 P.2d 510 (Hawaii 1970).

[106] 476 F.2d 67 (2d Cir. 1973).

[107] *Id.* at 71.

[108] *Id.* at 73. *See also* Simmons v. State, 301 So. 2d 565 (Miss. 1974) (applying the *Simmons v. United States* test).

under which it is possessed make it illegal. Such items as fruits of a theft from interstate commerce are within this category, but only when a defendant is charged with unlawful possession of such goods.[109] In crimes involving this type of contraband, possession, while an essential or central element of the crime, is not alone sufficient to support conviction.[110] Logically, it would seem that the same rules which apply to cases involving contraband per se should also apply here; however, the courts are split on this question.[111] In *Bullock v. United States*,[112] a defendant charged with interstate transportation of a stolen vehicle was denied standing to contest a warrantless search of a car on grounds that it had been "abandoned"[113] and that "the record [did] not show that appellant ever had or claimed any interest in this vehicle . . . ."[114] One who claimed that a stolen vehicle belonged to him, however, was found to have standing to object to a warrantless search of the car in *Weed v. United States*.[115] A similar result was reached in *Cotton v. United States*.[116] There, the court did not ground standing on an "automatic" theory, preferring instead to base its finding on the second rationale in *Jones*, the "legitimately on the premises" test.[117]

3. Fruits of a Theft

Evidence of possession of stolen goods is often the most damaging evidence in prosecutions for crimes such as robbery, burglary and larceny.[118]

> [A]n admission by the defendant of his possession of the stolen objects will relieve the prosecutor of proving one critical fact and, at the same time, will create damaging inferences as to the defendant's guilt. Again the dilemma appears, although admittedly the alternatives are less damaging to the defendant than in cases where he is charged with a

---

[109] Grove, *supra* note 3, at 160 n.57.

[110] Comment, *Standing to Object*, *supra* note 85, at 494.

[111] *See, e.g.*, Grove, *supra* note 3, at 159-60; Comment, *Standing to Object*, *supra* note 85, at 494-95.

[112] 368 F.2d 483 (5th Cir. 1966).

[113] *Id.* at 484; *accord*, Williamson v. State, 248 So. 2d 634 (Miss. 1971). *See also* State v. Cohn, 284 So. 2d 426 (Fla. Dist. Ct. App. 1973).

[114] 368 F.2d at 484.

[115] 340 F.2d 827 (10th Cir. 1965).

[116] 371 F.2d 385 (9th Cir. 1967).

[117] The court conceded Cotton was a "trespasser" but said he was still legitimately on the premises because "even a trespasser, if he has . . . taken actual possession of premises, acquires possessory rights against all the world except the true owner." *Id.* at 391. *See* text accompanying notes 150 through 154 *infra*.

[118] *See* Grove, *supra* note 3, at 160-61.

> crime of possession. Yet this dilemma may still induce a defendant to forego an attempt to challenge the legality of a search.[119]

In *Commonwealth v. Mayfield*[120] the accused was arrested for a traffic violation. While in custody at the police department, a warrantless search was made of the truck he was driving, revealing stolen merchandise. Even though the defendant apparently denied ownership of the truck and the stolen goods, he nevertheless had standing because he was in control of the truck at the time of his arrest.[121] This case was relied on as authority for the holding in *Williamson v. State*.[122] In *Williamson*, however, the defendant had no control over the truck, for at the time of the discovery of the stolen goods, the truck was being driven by another. The defendant's only connection was that he had been present when the vehicle was leased. Yet, the Mississippi Supreme Court found that "the defendant ha[d] standing to object to this evidence [the stolen goods]."[123]

4. Evidentiary Items

The final category for which the doctrine of automatic standing may have some relevance occurs when objects with some evidentiary value are introduced against a defendant at trial.[124] Marked money used to purchase narcotics, a murder weapon, or clothing worn during the commission of a crime are examples of such evidentiary items. To date, no court has applied the automatic standing rationale to suppress illegally seized evidence of this type. In *Robinson v. State*[125] a warrantless search of a hotel room uncovered evidence used against the defendant in his trial for armed robbery. The defendant was not present at the time of the search and was not, therefore, a "victim of the search." He had no privacy interests invaded and failed to show any interest in the seized property. The court concluded that he had no standing to object to the search.[126]

---

[119] Comment, *Standing to Object*, *supra* note 85, at 495.

[120] 394 S.W.2d 914 (Ky. 1971).

[121] *Id.*

[122] 248 So. 2d 634 (Miss. 1971).

[123] *Id.* at 638; *cf.* Simmons v. United States, 390 U.S. 377 (1968). *But cf.* Brown v. United States, 411 U.S. 223 (1973). *See also* White & Greenspan, *supra* note 12, at 344 n.65.

[124] *See generally* Comment, *Standing to Object*, *supra* note 85, at 496-97; 81 HARV. L. REV. 707, 710 (1968).

[125] 219 So. 2d 916 (Miss. 1969).

[126] *Id.* at 918-19; *cf.* Brown v. United States, 411 U.S. 223 (1973). *See also* Bullock v. United States, 368 F.2d 483 (5th Cir. 1966) (bed sheet and towel); Baldwin v. State, 282 Ala. 653, 213 So. 2d 819 (1968) (gun); Blevins v. State, 283 So. 2d 664 (Ala. Crim. App. 1973) (gun); State v. Vassel, 285 So. 2d 221 (La. 1973) (gun).

5. Limits to Automatic Standing

Although the Court in *Jones* indicated that they would look with disfavor on any case where the indictment was framed in general terms to deprive a defendant of standing while prosecuting for possession,[127] courts continued to circumvent this "possession as an essential element of the offense" test in order to deny standing.[128] Even though possession is the central element of the offense, standing may be denied because the defendant was not present on the premises at the time of the search,[129] because the defendant either denied[130] or failed to allege any interest in the seized objects,[131] or because the objects had been abandoned.[132] These numerous attempts to limit automatic standing frustrate the exclusionary rule and suggest judicial distaste for its results.

B. Relation to the Premises

Because a defendant's relation to the premises is often determinative of standing, courts are interested in what interest, if any, the defendant may have in the place searched.[133] Although a defendant was in the past denied standing if he was not the owner or legal possessor of the premises searched,[134] this is no longer the law.[135]

1. Persons Legitimately on the Premises

A defendant is able to claim the protections of the fourth amendment if he was legitimately on the premises at the time of the search.[136]

---

[127] Jones v. United States, 362 U.S. 257, 264-65 (1960).

[128] *See, e.g.*, Brown v. United States, 411 U.S. 223, 230 n.4 (1973) (indictment carefully worded to avoid charging possession on day of arrest); Freeland v. State, 285 So. 2d 895 (Miss. 1973) (defendant charged not with possession, but with manufacture and production of marijuana).

[129] *See, e.g.*, Houston v. State, 274 So. 2d 133 (Miss. 1973); Dozier v. State, 257 So. 2d 857 (Miss. 1972); Robinson v. State, 219 So. 2d 916 (Miss. 1969). *But see* Williamson v. State, 248 So. 2d 634 (Miss. 1971); Fuller v. State, 230 So. 2d 213 (Miss. 1970); Canning v. State, 226 So. 2d 747 (Miss. 1969).

[130] *See, e.g.*, Baldwin v. State, 282 Ala. 653, 213 So. 2d 819 (1968); Watkins v. State, 262 So. 2d 422 (Miss. 1972). *But see* Commonwealth v. Mayfield, 394 S.W.2d 914 (Ky. 1965); *cf.* United States v. Dean, 50 F.2d 905 (D. Mass. 1931).

[131] *See, e.g.*, Bullock v. United States, 368 F.2d 483 (5th Cir. 1966). *But cf.* Weed v. United States, 340 F.2d 827 (10th Cir. 1965).

[132] *See, e.g.*, Bullock v. United States, 368 F.2d 483 (5th Cir. 1966); United States v. Clancy, 285 F. Supp. 98 (S.D. Miss. 1968); United States v. Lewis, 227 F. Supp. 433 (S.D.N.Y. 1964); Campbell v. State, 278 So. 2d 420 (Miss. 1973). *But see* Grove, *supra* note 3, at 167. *See generally* 1974 WIS. L. REV. 212.

[133] *See generally* Grove, *supra* note 3, at 162-72.

[134] *See* note 13 & accompanying text *supra*.

[135] Jones v. United States, 362 U.S. 257 (1960).

[136] *Id.*

This includes the present owner,[137] an invited guest or visitor,[138] a defendant in his office or place of business,[139] and even a tenant at sufferance.[140] Although old property distinctions are no longer used to determine what categories of persons are legitimately present,[141] they *may* be used to determine when a person is *illegitimately* on the premises.[142] Thus a person may be denied standing if he is a trespasser,[143] if he once had some legitimate interest in the property but has since lost that status,[144] or if he denies a present interest in the premises.[145] The most accurate approach, therefore, is not to be concerned with legitimacy, but to attempt to determine when a person is *not* legitimately on the premises.[146]

2. Automobiles

Automobiles present a special situation subject to a wide variety of approaches. So long as the driver is either the owner or lessor of the automobile, he has standing.[147] If the auto is stolen, however, Mississippi equates the driver to a trespasser and does not allow him to contest a search of the car.[148] The same result is reached if any occupant denies an interest in the automobile.[149] An alternative to this strict approach is favored by some commentators[150] and was used in *Cotton v. United States*.[151] Although the case was concerned principally with automatic standing based on possession of derivative contraband,[152] the court took

---

[137] Alderman v. United States, 394 U.S. 165 (1969); United States v. Dean, 50 F.2d 905 (D. Mass. 1931).

[138] Canning v. State, 226 So. 2d 747 (Miss. 1969).

[139] Mancusi v. DeForte, 392 U.S. 364 (1968); United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951).

[140] Klee v. United States, 53 F.2d 58 (9th Cir. 1931).

[141] Jones v. United States, 362 U.S. 258, 266 (1960).

[142] *Cf. id.* at 267 (1960): "This [legitimately-on-the-premises test] would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched."

[143] *See, e.g.,* Blevins v. State, 283 So. 2d 664 (Ala. Crim. App. 1973).

[144] *See, e.g.,* State v. Vassel, 285 So. 2d 221 (La. 1973). *See also* note 132 & accompanying text *supra.*

[145] *See, e.g.,* Watkins v. State, 262 So. 2d 422 (Miss. 1972), *cert. denied,* 410 U.S. 958 (1973); *cf.* People v. MacDonald, 18 N.Y.2d 509, 511-13, 223 N.E.2d 785, 788, 277 N.Y.S.2d 257, 259-60 (1966) (Keating, J., dissenting).

[146] *Cf.* Russell v. State, 270 So. 2d 462 (Fla. Dist. Ct. App. 1972).

[147] *See, e.g.,* Weed v. United States, 340 F.2d 827 (10th Cir. 1965); Hamburg v. State, 248 So. 2d 430 (Miss. 1971).

[148] *Cf.* Williamson v. State, 248 So. 2d 634, 638 (Miss. 1971). *See also* Bullock v. United States, 368 F.2d 483 (5th Cir. 1966).

[149] Watkins v. State, 262 So. 2d 422 (Miss. 1972), *cert. denied,* 410 U.S. 958 (1973).

[150] *See, e.g.,* Grove, *supra* note 3, at 168-70; White & Greenspan, *supra* note 12, at 344.

[151] 371 F.2d 385 (9th Cir. 1967).

[152] *See* text accompanying notes 109 through 117 *supra.*

the old nuances of common law property and applied them in favor of the defendant. A trespasser, said the court, "if he has also taken actual possession of premises, acquires possessory rights against all the world except the true owner."[153] One having present possession, even if it is wrongful,

> is entitled to protection against all who do not have a paramount right to possession [and the rule] is equally applicable to chattels, such as a car. Thus even a thief of a chattel can acquire title to it by adverse possession.[154]

C. Invasion of Privacy

The United States Supreme Court in *Katz v. United States*,[155] indicated that fourth amendment protections are not contingent upon any property interest in the premises searched, but rather depend on whether the area searched was one in which the defendant had a "reasonable expectation of privacy."[156] The fourth amendment is designed to protect people, not places.[157] Such a rationale was used to grant standing in *Mancusi*.[158] There is some constitutional authority for the proposition that a defendant must establish himself as a victim of an invasion of privacy before his complaint will be heard.[159] In addition, there is ample authority in Mississippi that one will not be granted standing unless his privacy was invaded by some state action.[160] From the language of *Katz*,[161] however, it appears that the concept has not been extended beyond those areas owned or controlled by the defendant.[162] In

---

[153] 371 F.2d at 391.

[154] *Id.* This case is cited as authority for Williamson v. State, 248 So. 2d 634, 638 (Miss. 1971).

[155] 389 U.S. 347 (1967).

[156] *See id.* at 360 (Harlan, J., concurring).

[157] *Id.* at 351.

[158] Mancusi v. DeForte, 392 U.S. 364, 368-70 (1968).

[159] Alderman v. United States, 394 U.S. 165, 173 (1969). *But see* United States v. Mapp, 476 F.2d 67 (2d Cir. 1973); People v. McDonnell, 18 N.Y.2d 509, 223 N.E.2d 785, 277 N.Y.S.2d 257 (1966).

[160] *See* Campbell v. State, 278 So. 2d 420 (Miss. 1973); Scott v. State, 266 So. 2d 567 (Miss. 1972); Robinson v. State, 219 So. 2d 916 (Miss. 1969). *Compare* Fuller v. State, 230 So. 2d 213 (Miss. 1970), *with* Freeland v. State, 285 So. 2d 895 (Miss. 1973). *See also* 44 MISS. L.J. 298 (1973).

[161] "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." 389 U.S. at 351.

[162] *See, e.g.*, Freeland v. State, 285 So. 2d 895 (Miss. 1973); or to the "open fields," Hester v. United States, 265 U.S. 57 (1924); or to areas accessible to the "open eye," Campbell v. State, 278 So. 2d 420 (Miss. 1973); *cf.* Wolf v. State, 281 So. 2d 445 (Miss. 1973). *But see* State v. Dias, 470 P.2d 510 (Hawaii 1970). "[W]hat [a person] seeks to preserve as private, even in an area accessible to the public may be constitutionally protected." Katz v. United States, 389 U.S. 347, 351 (1967).

Campbell v. State,[163] no privacy interests of the defendant were violated when police seized articles of clothing hanging outside the house or a belt and shoes which were discovered in a trash can.[164] These cases show that a defendant clearly establishing that his *reasonable* expectations of privacy were invaded by agents of the state will be granted standing.

D. The "Person Aggrieved"

In *Canning v. State*[165] the court indicated that anyone who can be classified as a "person aggrieved" under rule 41(e) of the Federal Rules of Criminal Procedure will be granted standing.[166] Must one have been a "victim of the search or seizure" or only "one against whom the search was directed" to meet the "person aggrieved" test? The weight of authority is that a defendant must be both the "victim" and the "target" in order to claim standing.[167] There is some authority to the contrary,[168] however, and at least one commentator feels that determining standing on the basis of whether one was the target of the search is the most equitable and fair approach.[169]

E. Derivative Standing

When a defendant attempts to object because the fourth amendment rights of another person were violated, he alleges "derivative" standing.[170] Because fourth amendment rights are personal and not subject to vicarious assertion,[171] the derivative standing doctrine has never

---

[163] 278 So. 2d 420 (Miss. 1973).

[164] The court concluded the items of clothing were in plain view and, as a practical matter, the shoes and belt had been abandoned. 278 So. 2d at 422-23. *But see* 1974 Wis. L. Rev. 212.

[165] 226 So. 2d 747 (Miss. 1969).

[166] *Id.* at 751; *see* Alderman v. United States, 394 U.S. 165 (1969), wherein the Court said that rule 41 was "no broader than the constitutional rule." *Id.* at 173 n.6.

[167] Alderman v. United States, 394 U.S. 165 (1969); Mancusi v. DeForte, 392 U.S. 364 (1968); Garza-Fuentes v. United States, 400 F.2d 219 (5th Cir. 1968); Robinson v. State, 219 So. 2d 916 (Miss. 1969).

[168] *See* United States v. Mapp, 476 F.2d 67 (2d Cir. 1972); *cf.* People v. McDonnell, 18 N.Y.2d 509, 223 N.E.2d 785, 277 N.Y.S.2d 257 (1966).

[169] White & Greenspan, *supra* note 12, at 349-66.

[170] Derivative standing is more precisely defined as standing accorded a party who (1) had no possessory interest in the property seized or premises searched . . . or (2) was not a person legitimately on the premises searched, or (3) had not been charged with an offense of which possession alone is an illegal element sufficient to convict the person of the crime.

Comment, *supra* note 8, at 132 n.5. *See also* Grove, *supra* note 3, at 172-73.

[171] Alderman v. United States, 394 U.S. 165, 174 (1969). *See also* Watkins v. State, 262 So. 2d 422 (Miss. 1972), *cert. denied,* 410 U.S. 958 (1973).

been accepted by the United States Supreme Court.[172] It was rejected most recently in *Brown v. United States*.[173] Something resembling derivative standing occasionally has been applied in cases involving codefendants.[174] For example, in *Williamson v. State*[175] the defendant had no possessory interest in the property seized and little interest in the premises. He was not present when the search was conducted, and it easily could be argued that he was not charged with an offense where proof of possession alone is sufficient for conviction. Yet, he was granted standing to object to the search of a truck in which stolen merchandise had been discovered.[176]

F. Additional Standing Considerations

Two areas present problems for the current standing doctrine: wiretapping or electronic surveillance and derivative standing based on the violation of someone else's fifth or sixth amendment rights.

Although standing has always been accorded in wiretap cases where the police actually invaded one's premises to install the tap,[177] it wasn't until *Katz v. United States*[178] that the requirement for a physical intrusion was discarded, and not until *Alderman v. United States*[179] that participants in the conversation, as well as those controlling the premises, could claim standing.[180] The evidence, however, may still be used against one not a participant in the conversation,[181] a fact which prompted Justice Fortas' vehement dissent to the holding in *Alderman*:

> Surreptitious electronic surveillance . . . is usually the product of calculated, official decision rather than the error of an individual agent of the state. And because by nature it is hidden, unlawful electronic surveillance is even more offensive to a free society than the unlawful search and seizure of tangible material.[182]

---

[172] *See, e.g.*, Alderman v. United States, 394 U.S. 165, 171 (1969); Simmons v. United States, 390 U.S. 377, 389 (1968); Wong Sun v. United States, 371 U.S. 471 (1963); Jones v. United States, 362 U.S. 257, 261 (1960).

[173] 411 U.S. 223, 229 (1973).

[174] *See, e.g.*, McDonald v. United States, 335 U.S. 451 (1948); Rosencranz v. United States, 334 F.2d 738 (1st Cir. 1964). *See generally* Grove, *supra* note 3, at 172-77; Comment, *supra* note 8, at 141-47; Comment, *Standing to Object*, *supra* note 85, at 507.

[175] 248 So. 2d 634 (Miss. 1971).

[176] *Id.* at 638. *But see* Robinson v. State, 219 So. 2d 916 (Miss. 1969).

[177] *See, e.g.*, Olmstead v. United States, 277 U.S. 438 (1927).

[178] 389 U.S. 347 (1967).

[179] 394 U.S. 165 (1969).

[180] *See generally* White & Greenspan, *supra* note 12, at 360-65; Note, *Standing and the Fourth Amendment*, 38 U. CIN. L. REV. 691 (1969); 48 J. URBAN L. 542 (1971).

[181] Alderman v. United States, 394 U.S. 165 (1969). *But cf.* People v. McDonnell, 18 N.Y.2d 509, 223 N.E.2d 785, 277 N.Y.S.2d 257 (1966).

[182] 394 U.S. at 203.

Because of the pervasive nature of electronic surveillance, the scope of unlawful activities uncovered is much greater. The method is, therefore, both favored by the government and subject to great abuse.[183] Tapping the phone of an underling to obtain information about higher-ups in a conspiracy is a practice that probably has been followed since higher-ups apparently would be denied standing to object to the illegal search.[184]

Another problem encountered in a derivative standing context is the standing of a third party to object to evidence obtained from a suspect who has been interrogated without being advised of his rights.[185] Even California, where standing requirements in fourth amendment cases have been abolished, has denied standing to a third party in such a situation.[186]

IV. Conclusion

The standing doctrine, even as presently modified, has been severely criticized[187] for being directly contradictory to the avowed purpose of the exclusionary rule—deterring illegal police practices.

> [T]he present form of the rule of standing prevents the exclusionary rule from deterring unlawful searches when, as in many cases, the actual victim of the search is expected to be an innocent man. Under the present rules, the police are not deterred from making an unlawful search which will invade an innocent man's privacy. Neither the innocent victim of the search nor the intended target have standing to object. Present standing rules do, however, deter the police from mak-

---

[183] *See* Note, *supra* note 180, at 691.

[184] *See, e.g.*, White & Greenspan, *supra* note 12, at 351.

[185] Two examples of this sort of practice are in *id.* at 357-58:

> Variation 1: Without advising *A* of his constitutional rights as required by *Miranda v. Arizona*, the police ask *A* where the stolen money is hidden. *A* tells the officers that it is hidden in the cellar of *B*'s house. A valid search warrant is obtained, the money is recovered, and the state seeks to introduce it into evidence at *B*'s trial for robbery.
>
> Variation 2: When the police question *A* concerning the location of the money, he refuses to answer their questions. Thereupon, the police beat *A* until he finally submits and reveals the location of the money. Again a valid search warrant is obtained, the money is recovered, and the police seek to introduce it into evidence at *B*'s trial for robbery.

The commentators indicate that *B* would probably have no standing in Variation 1 and possibly not in Variation 2. For a recent example of a situation analagous to Variation 1, see Simmons v. State, 301 So. 2d 565 (Miss. 1974).

[186] *See* People v. Varnum, 66 Cal. 2d 808, 427 P.2d 772, 59 Cal. Rptr. 108 (1967), *noted in* 81 Harv. L. Rev. 707 (1968).

[187] *See* Grove, *supra* note 3, at 178-79; White & Greenspan, *supra* note 12, at 365-66; Note, *supra* note 180, at 699-702; Comment, *Standing to Object, supra* note 85, at 519-20.

> ing an unlawful search of papers of a man suspected of criminal activity. To protect the 'guilty' and not the 'innocent' is anomalous.[188]

Standing is just as stoutly defended by those who concede the deterrent effect of the exclusionary rule but feel that the standing doctrine and the exclusionary rule must be balanced in the public interest. They maintain that there is a limit to the amount of deterrence which may be gained.[189]

The courts' attempts to balance the competing policy considerations of the standing doctrine and exclusionary rule have resulted in a confusing and sometimes inherently contradictory body of law.[190] Both the confusion and the contradictions would be alleviated if the courts would grant standing to "the target of the search" in all cases, including perhaps a blanket proscription in wiretap cases.[191] This approach would appear to satisfy the deterrence rationale of the exclusionary rule and to limit the rule's harsh effects. It should not be difficult to determine, in the aftermath of the search, who was the intended target. If there is any thread which runs through most of the standing cases, it is that the person granted standing was the "target of the search." This approach would grant "derivative" standing to those upon whom the search was focused but would deny it to mere victims of a search directed at someone else. The target-of-the-search approach would apply to all persons or classes of persons who were the intended objects of the police search. "If the focus is placed on the intent of the officer, the deterrent purpose of exclusion is served without allowing application of the rule to become a public nuisance."[192]

Russell P. Grant, Jr.

---

[188] White & Greenspan, *supra* note 12, at 365-66.

[189] *See, e.g.,* Alderman v. United States, 394 U.S. 165, 174-75 (1969); Weeks, *supra* note 13, at 77-81; Comment, *supra* note 8, at 146-47.

[190] In an attempt to balance these competing policy considerations, at least one jurisdiction has eliminated the standing requirement. People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955) (en banc); *see* McCORMICK, *supra* note 3, § 179, at 419 n.15. *But see* People v. Estrada, 28 App. Div. 2d 681, 280 N.Y.S.2d 825 (1967), *aff'd mem.*, 23 N.Y.2d 719, 244 N.E.2d 57, 296 N.Y.S.2d 364 (1968), *cert. denied*, 394 U.S. 953 (1969); Comment, *supra* note 8, at 136-37. *See generally* Grove, *supra* note 3, at 178-79.

[191] This was favored by Justice Fortas in Alderman v. United States, 394 U.S. 165, 208-09 (1969), and is supported by White & Greenspan, *supra* note 12, at 349-56.

[192] White & Greenspan, *supra* note 12, at 366.

RECENT DECISIONS

DEEDS OF TRUST—FUTURE ADVANCES—DEBT SECURED BY DEED OF TRUST ON HOMESTEAD PROPERTY PROVIDING FOR FUTURE ADVANCES MAY BE ENLARGED BY ONE SPOUSE ACTING ALONE IN OBTAINING AN ADDITIONAL ADVANCE OR SUBSEQUENT LOAN

Myrtis Jones brought an action in the Chancery Court of the Second Judicial District of Jasper County, Mississippi, to enjoin the Newton County Bank from foreclosing on a deed of trust.[1] Mrs. Jones and her husband had executed the deed of trust on their homestead to secure a note executed by both of them payable to the bank.[2] The deed of trust provided for unlimited future advances. Mrs. Jones contended that the future advance clause[3] did not cover subsequent notes executed by Mr. Jones on new security without her knowledge or consent.[4]

---

[1] The Newton County Bank (Louin Branch Office) and B.T. (Jack) Amos (trustee of the deed of trust) were named as defendants.

Deeds of trust, rather than conventional two-party mortgages, are the most frequently used security devices in Mississippi. The grantor in a deed of trust is the mortgagor; the beneficiary-lender in a deed of trust is the mortgagee. The trustee in a deed of trust holds the security in trust for the benefit of the beneficiary. The grantor-mortgagor and the beneficiary-mortgagee terminology is used interchangeably in this note.

[2] Mrs. Jones owned the 40 acres constituting the homestead; her husband owned no interest in the property.

Statutory protection for homestead property in Mississippi provides:

> Every citizen of this state, male or female, being a householder, and having a family, shall be entitled to hold exempt from seizure or sale, under execution or attachment, the land and buildings owned and occupied as a residence by him, or her, but the quantity of land shall not exceed one hundred and sixty acres, nor the value thereof, inclusive of improvements . . . the sum of fifteen thousand dollars . . . .

MISS. CODE ANN. § 85-3-21 (1972).

> When the wife owns the homestead, and occupies the same with her family, it shall be exempt from seizure or sale under execution or attachment, in the same manner and to the same extent as such real property is exempt to any other householder having a family, as provided in this chapter.

MISS. CODE ANN. § 85-3-45 (1972).

> A conveyance, mortgage, deed of trust or other incumbrance of a homestead where it is the property of the wife shall not be valid or binding unless signed and acknowledged by the owner and the husband if he be living with his wife . . . .

MISS. CODE ANN. § 89-1-31 (1972).

[3] The unlimited future advance clause provided that it was intended *"to secure all loans and advances which Beneficiary has made or may hereafter make to the Grantor, or any one of them.* (Emphasis added)" Newton County Bank v. Jones, 299 So. 2d 215, 216 (Miss. 1974). The clause appeared in the bank's printed deed of trust form, and the court called the clause a dragnet clause. *See* note 19 *infra*.

[4] Mrs. Jones and her husband had executed a $7,000 note to the bank simultaneously with the deed of trust on their 40-acre homestead. Subsequently, the husband alone executed new notes to the bank using 83 head of cattle as security for the new, separate financing statement. Mrs. Jones knew nothing of these transactions. The bank attempted

The bank contended that the future advance clause covered Mr. Jones' subsequent notes to the bank. The chancery court held for Mrs. Jones, decreeing a permanent injunction against the foreclosure and allowing the bank to recover only the indebtedness of the joint note specifically referred to in the deed of trust. On appeal to the Mississippi Supreme Court, *held*, reversed and rendered. If a deed of trust on homestead property is executed by competent spouses and provides for future advances and loans, the original lien on the homestead may be enlarged through the future advance clause by one of the spouses acting without the knowledge or assent of the other spouse in obtaining an additional advance or subsequent loan from the mortgagee; assent of the nonparticipating spouse to such an enlargement of the lien on the homestead is deemed to have been given in advance in the mutual execution of the deed of trust. *Newton County Bank v. Jones,* 299 So. 2d 215 (Miss. 1974), *rev'g* No. 47,381 (Miss. Sup. Ct., Apr. 15, 1974).[5]

The principles of future advance provisions in mortgages had their origins in the Roman civil law[6] and were adopted early in the English common law.[7]

---

to replevy the cattle but were unable to find them. The bank then turned to the future advance clause in the deed of trust and attempted to foreclose on the homestead to secure payment of the joint $7,000 note and the separate notes executed by Mr. Jones which amounted to $16,412.33.

[5] *Newton County Bank v. Jones* was decided twice within 5 months by the Mississippi Supreme Court. The court's first opinion was handed down April 15, 1974, with Justice Robertson writing the majority opinion. He was joined by Justices Rodgers, Gillespie, Patterson, and Walker. Two dissents were filed in the April 15th decision, one written by Justice Broom and the other written by Justice Smith, in both of which Justices Inzer and Sugg joined. Newton County Bank v. Jones, No. 47,381 (Miss. Sup. Ct., Apr. 15, 1974), *rev'd on rehearing*, 299 So. 2d 215 (Miss. 1974).

The instant opinion was rendered August 26, 1974, overruling the April 15th decision. Justice Broom wrote for the majority and was joined by Justices Rodgers, Inzer, Sugg, and Smith. Justice Robertson filed a dissenting opinion in which Justices Gillespie, Patterson, and Walker joined. Newton County Bank v. Jones, 299 So. 2d 215 (Miss. 1974), *rev'g* No. 47,381 (Miss. Sup. Ct., Apr. 15, 1974).

[6] Roman jurisprudence provided in the case of pledges that "the pawnee might always retain [the pledge], not only for the sum for which it was specifically pledged, but for all other moneys due him on any account whatever." Jarvis v. Rogers, 15 Mass. 389, 407, 15 Mass. Rep. 350, 364 (1819), *cited in* 4 J. KENT, COMMENTARIES ON AMERICAN LAW 175 n.(b).

[7] *See* 1 L. JONES, MORTGAGES OF REAL PROPERTY § 448 (8th ed. 1928); 3 G. GLENN, MORTGAGES § 399 (1943). *Compare* Gordon v. Graham, 2 Eq. Cas. Abr. 598, 7 Vin. Abr. 52, 22 Eng. Rep. 502 (1716), *with* Rolt v. Hopkinson, 25 Beav. 461, 53 Eng. Rep. 713 (Ch. 1858).

The mortgage for future advances was justified in England by the title theory of mortgages which vested legal title to the mortgaged premises in the mortgagee and gave the mortgagor no right to possession. 3 G. GLENN, *supra*.

> Inasmuch as the mortgagee had title under the theory which inspired the mortgage in its early development, it was easy to hold that he could retain the security, not only for the loan presently made, but also for future loans if so stipulated.

Id. § 399, at 1602-03. The mortgagor's plight is founded on the original view of the mortgage as a pledge. 1 *id.* § 28.

"By the early 1800's, the American economy had developed to a point where the need for secured future advance financing began to manifest itself."[8] Most of the future advance law in this country, however, has developed in the three decades following World War II. The postwar construction boom in housing and in the commercial field encouraged builders and lenders to negotiate more flexible credit arrangements, resulting in the future advance forms used today.[9] At the present time, the validity of mortgages and deeds of trust providing for future advances made in good faith[10] is well-established in this country.[11] Litigation involving future advances has centered around statutory restrictions,[12] the

---

[8] Jefferies, *Yarborough Scrutinized: An Analysis of the Theoretical Foundations of the Future Advance Mortgage,* 30 OHIO ST. L.J. 458, 464 (1969); *see, e.g.*, Shirras v. Caig, 11 U.S. (7 Cranch) 34 (1812).

[9] Note, *The Package Mortgage and Optional Future Advances,* 65 HARV. L. REV. 478 (1952); *see* 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 35.3, at 923 (1965); Blackburn, *Mortgages to Secure Future Advances,* 21 MO. L. REV. 209 (1956); Note, *Refinements in Additional Advance Financing: The "Open End" Mortgage*, 38 MINN. L. REV. 507 (1954).

Mortgages to secure future advances generally fall into one of four broad categories of form:

> In the first type the instrument makes no mention of future advances . . . . Actually only a portion of [the] stated amount is lent to the mortgagor, and, by oral agreement or a written collateral agreement, the parties manifest their intentions with reference to future advances.
>
> In the second catagory [sic], the instrument is drafted so as to expressly provide for the making of future advances. . . . This form is generally referred to as a mortgage to secure "obligatory future advances."
>
> In the third type, the mortgage will also provide expressly for the making of future advances, but the making of these advancements is strictly within the discretion of the mortgagee. Such a device is termed a mortgage to secure "optional future advances," but currently is becoming more familiarly known as an "open end" mortgage. Instruments purporting to secure optional advances are generally drawn either as "limited" or "unlimited . . . ."
>
> The fourth . . . classification of future advances is . . . that the mortgagee may, at his own option, and without the consent of the mortgagor, make such advances or expenditures as are necessary to protect his interest or preserve the value of the security.

Blackburn, *supra*, at 213-15.

Dragnet or anaconda clauses, which are broad types of future advance provisions, are looked upon with disfavor by the courts. *Id.* at 212; *see* Berger v. Fuller, 180 Ark. 372, 21 S.W.2d 419 (1929); Hudson v. Bank of Leakesville, 249 So. 2d 371 (Miss. 1971); Reddish, *Open-end Mortgages and Priorities in Nebraska,* 38 NEB. L. REV. 172, 173 (1959).

[10] Comment, *The Open-End Mortgage—Future Advances: A Survey,* 5 DEPAUL L. REV. 76, 78 (1955).

[11] 1 L. JONES, *supra* note 7; Blackburn, *supra* note 9, at 215 & n.27; Jones, *Mortgages Securing Future Advances,* 8 TEXAS L. REV. 371, 372 (1930). *But cf.* 2 G. GILMORE, *supra* note 9, § 35.1, at 917.

[12] More than one-third of the states have adopted statutes restricting or regulating future advance provisions in mortgages and deeds of trust. CONN. GEN. STAT. ANN. §§ 49-2 to -4 (1958), *as amended,* (Supp. 1973); FLA. STAT. ANN. §§ 665.391 (Supp. 1974-1975), 697.03-.04 (1969), *as amended,* (Supp. 1974-1975); GA. CODE ANN. §§ 67-1316 to -1317

scope of the security and the intentions of the parties to the security instrument,[13] and lien priorities.[14] The primary source of litigation involving future advance provisions in Mississippi has been the issue of lien priorities.[15]

Mortgages and deeds of trust providing for future advances appeared early in Mississippi, many times securing the month-to-month advances for farm expenses and farm supplies.[16] Many of these mortgages were on chattels.[17] The validity of future advance provisions has been established in this state[18] notwithstanding a tendency on the part of the Mississippi Supreme Court to ignore the differences between future advance clauses and dragnet clauses.[19] Broadly

---

(1967); IDAHO CODE § 45-108 (Supp. 1973); ILL. ANN. STAT. ch. 30, § 37a (Smith-Hurd 1969); KAN. STAT. ANN. § 9-1101(4) (1964); KY. REV. STAT. ANN. § 382.520 (1969); LA. CIV. CODE ANN. arts. 3292-93 (West 1952); ME. REV. STAT. ANN. tit. 9, § 561(1)(f) (Supp. 1974-1975); MD. ANN. CODE art. 66, §§ 2-3 (1972); MASS. GEN. LAWS ANN. ch. 140, § 107 (Supp. 1973); MONT. REV. CODES ANN. § 52-201 (1961); NEB. REV. STAT. § 76-238.01 (1966); N.H. REV. STAT. ANN. §§ 479:3-:5 (1968), *as amended*, (Supp. 1973); N.C. GEN. STAT. §§ 45-67 to -74 (Supp. 1973); OHIO REV. CODE §§ 5301.23-.233 (Page 1970); OKLA. STAT. ANN. tit. 42, § 9 (1954); R.I. GEN. LAWS ANN. §§ 34-25-1 to -6 (1969); S.C. CODE ANN. § 45-55 (1962).

Most states which have adopted the Uniform Commercial Code have future advance provisions in secured transactions under the Code. *E.g.*, MISS. CODE ANN. § 75-9-204 (1972).

[13] Blackburn, *supra* note 9, at 218; *e.g.*, Campbell Bros. v. Bigham, 149 Miss. 214, 115 So. 395 (1928).

[14] The issue of lien priorities arises in connection with the optional-obligatory distinction in future advance provisions. The accepted rule is that where the mortgagee is obligated to make future advances,

> the lien of the mortgage will take effect from the time of the recording of the mortgage and that it will have priority over an intervening lien, regardless of whether the mortgagee has notice of the intervening lien before he makes the advance and regardless of whether the notice is actual or constructive.

Note, *Mortgages for Future Advances: The Need for Legislation in Wisconsin,* 1965 WIS. L. REV. 175, 178.

In the optional situation, "most jurisdictions agree that an intervening lien will take priority over any advance made by the mortgagee only after the lienholder has given the mortgagee actual notice of his intervening claim." *Id.* at 179.

[15] The court has held that optional future advances will have priority over an intervening lien only if the mortgagee does not have actual notice of the intervening lien. North v. J. W. McClintock, Inc., 208 Miss. 289, 44 So. 2d 412 (1950).

Where the mortgagee is obligated to make future advances, Mississippi is in accord with the majority of jurisdictions which have held that the lien of the mortgage takes precedence over intervening liens regardless of notice. *See* Witczinski v. Everman, 51 Miss. 841 (1876); note 14 *supra; cf.* 32 MISS. L.J. 325 (1961).

[16] *E.g.*, Coleman v. Galbreath, Stewart & Co., 53 Miss. 303 (1876); Witczinski v. Everman, 51 Miss. 841 (1876).

[17] *E.g.*, Summers v. A. Roos & Co., 42 Miss. 749, 2 Am. R. 653 (1869); cases cited note 16 *supra.* A more recent example of a mortgage on chattels providing for future advances is Cavins v. Planters Bank & Trust Co., 187 F.2d 906 (5th Cir. 1951) (crops, Mississippi law).

[18] *E.g.*, Gray v. Helm, 60 Miss. 131 (1882).

[19] The court refers to the future advance clause in the instant case as a dragnet clause,

speaking, a dragnet clause is a form of future advance clause which, when used in a deed of trust, attempts to have that instrument secure all indebtedness that may become owing from the mortgagor to the mortgagee.[20] Under such a definition, the mortgagee can make loans on new agreements, make future advances, or even buy the grantor's debts to third persons and foreclose on all such debts by virtue of the dragnet clause.[21] A future advance clause is the device by which

---

thus creating some confusion in respect to future advance terminology in mortgages and deeds of trust. There is a difference between what is commonly termed a dragnet clause and a clause to secure future advances. A dragnet clause is a variation of a future advance provision. Note, *Refinements in Additional Advance Financing: The "Open End" Mortgage,* 38 MINN. L. REV. 507, 509 n.14 (1954).

> Future advance provisions in mortgages or deeds of trust may be explained as follows:
> [T]he obligation secured by a mortgage for future advances is the legally binding, single promise of the mortgagor, made when the transaction is first entered into, to repay all of those advances *within the scope of the agreement* which are made then and later . . . .

4 AMERICAN LAW OF PROPERTY § 16.71, at 133 (A. J. Casner ed. 1952) (emphasis added); G. OSBORNE, MORTGAGES § 114, at 179 (2d ed. 1970); *see* Hastie, *Modern Real Estate Transactions*, in FRONTIERS IN REAL ESTATE 81, 129 (Mississippi Law Institute 1973) (form of future advance clause); Reddish, *supra* note 9.

Future advance clauses in mortgages and deeds of trust may be optional, where the mortgagee has discretion to grant or deny the advances, or the clause may be obligatory, where the mortgagee is obligated to make the advances. In North v. J. W. McClintock, Inc., 208 Miss. 289, 44 So. 2d 412 (1950), the court called the future advance clause there an optional clause and distinguished it from obligatory clauses found in Gray v. Helm, 60 Miss. 131 (1882), and Liberty Mercantile Co. v. Allen, 134 Miss. 354, 98 So. 774 (1924). The optional-obligatory distinction usually arises in connection with lien priorities. The mortgage to secure optional future advances is often referred to as an "open end" mortgage. Blackburn, *supra* note 9, at 214.

The mortgage to secure future advances may be unlimited, as in the instant case, with no mention of the total amount which may be advanced, or limited to a maximum amount stated in the mortgage or deed of trust. Blackburn, *supra* note 9.

On the other hand, a dragnet clause in a mortgage or deed of trust may be defined as: "the lender's claim that obligations of the mortgagor which are in no sense related to the financing transaction which the mortgage was given to secure are, nevertheless, covered by the mortgage." 2 G. GILMORE, *supra* note 9, § 35.2, at 917-18; *see* Reddish, *supra* note 9.

The Mississippi Supreme Court apparently first used the term "dragnet clause" in 1953 in properly describing a deed of trust provision that embraced *any* subsequent indebtedness of the grantor to the lender. Walters v. Merchants & Mfrs. Bank, 218 Miss. 777, 67 So. 2d 714 (1953). Prior to that time, the language used was that of future advance clauses. *See, e.g.*, North v. J. W. McClintock, Inc., 208 Miss. 289, 44 So. 2d 412 (1950); Summers v. A. Roos & Co., 42 Miss. 749, 2 Am. R. 653 (1869).

The bank's use of the clause in the instant case to cover the husband's debts on the new security which could not be found colored the clause with a dragnet aura. For the sake of legal terminology, however, the instrument and future advance clause in the instant case will be referred to as a mortgage to secure unlimited future advances. *See* note 9 *supra*.

[20] *See* note 19 *supra*.

[21] Most jurisdictions, however, have limited the use of dragnet clauses. *E.g.*, Berger

advances within the scope of an original deed of trust or mortgage agreement providing for such advances are brought under the security of those instruments.[22] The court has held that future advance provisions in mortgages and deeds of trust may be unlimited and therefore need not state a definite sum.[23]

The instant decision must be analyzed in light of the long line of cases interpreting Mississippi's homestead statutes.[24] The statutes at their inception were designed to give the wife protection in lieu of dower which had been abolished by statute.[25] The court consistently has held that the homestead statutes are to be construed liberally in favor of the exemptionist[26] and that the purpose of the statutes is to protect the wife from the imprudence of the husband in conveying or encumbering the homestead property.[27] The statutes give the wife a veto power over the husband's encumbering or conveying the homestead but impose no limitation on his common law right to deal with the indebtedness secured by the homestead.[28] In considering deeds of trust and mortgages on homestead property, the court has held in accord with the statute[29] that both the husband's and wife's signatures, evidencing contemporaneous assent, must be on the instrument encumbering the homestead property.[30] The court held in *Smith v. Scherck*[31] that a husband acting alone can renew the debt and the security of a deed of trust on the homestead to defeat the bar of the statute of limitations where the deed of trust was executed by both spouses.[32] Following a reasoning that is contrary to the protection given the homestead by the court and the legislature, the court in *Howell v. Bush,*[33] in reference to deeds of trust on the homestead, stated:

---

v. Fuller, 180 Ark. 372, 21 S.W.2d 419 (1929); Hudson v. Bank of Leakesville, 249 So. 2d 371 (Miss. 1971); *see* Reddish, *supra* note 9.

[22] *See* note 19 *supra*.

[23] Candler v. Cromwell, 101 Miss. 161, 57 So. 554 (1911); Witczinski v. Everman, 51 Miss. 841 (1876).

[24] *See* note 2 *supra*.

[25] Grantham v. Ralle, 248 Miss. 364, 375, 158 So. 2d 719, 724 (1963).

[26] *E.g.*, Biggs v. Roberts, 237 Miss. 406, 115 So. 2d 151 (1959); Gardner v. Cook, 173 Miss. 244, 158 So. 150 (1934).

[27] Grantham v. Ralle, 248 Miss. 364, 158 So. 2d 719 (1963); Hand v. Winn, 52 Miss. 784 (1876); Montgomery, *A Review of Mississippi Cases on Homestead Law,* 16 MISS. L.J. 249 (1944). *But see* Howell v. Bush, 54 Miss. 437 (1877).

[28] McFarlane v. Plant, 185 Miss. 616, 188 So. 530 (1939).

[29] MISS. CODE ANN. § 89-1-31 (1972); *see* note 2 *supra*.

[30] Hughes v. Hahn, 209 Miss. 293, 46 So. 2d 587 (1950); Hubbard v. Sage Land & Improvement Co., 81 Miss. 616, 33 So. 413 (1903); Gulf & S.I.R.R. v. Singleterry, 78 Miss. 772, 29 So. 754 (1901); Duncan v. Moore, 67 Miss. 136, 7 So. 221 (1890).

The timing of the contemporaneous assent is important: "[T]he time at which the contemporaneous assent of the husband and wife must exist is the time when the deed is finally executed by her joinder therein." Hughes v. Hahn, *supra* at 299, 46 So. 2d at 590. *But cf.* Howell v. Hill, 94 Miss. 566, 48 So. 177 (1909) (8-month gap between signatures). *See generally* Comment, *Homestead Exemption Law in Mississippi as It Affects the Claims of Creditors,* 36 MISS. L.J. 69 (1964).

[31] 60 Miss. 491 (1882); *see* Herron v. Land, 151 Miss. 893, 119 So. 823 (1929); Tomlin v. Combs, 21 So. 782 (Miss. 1897).

[32] 60 Miss. at 495.

[33] 54 Miss. 437 (1877).

> Where parties capable of contracting make their own arrangements, and there is neither fraud nor mistake of fact, equity will not interpose to thwart their designs or change their agreements. It will not make contracts for the parties. We are not disposed to favor "homestead rights" at the expense of law or justice . . . .[34]

Following this rationale, the court in *Atkinson Bacot v. Varnado*[35] held that a husband and wife may execute a valid mortgage on after-acquired property even though such property will be used as a homestead.[36] Future advances, however, were not at issue when the court in *Varnado* said: "[T]he husband and wife have by their own voluntary, solemn contract, founded on a valuable consideration, bargained away their homestead."[37] In considering future advance provisions in mortgages and deeds of trust on the homestead, the court made it clear in *Campbell Brothers v. Bigham*[38] that the debt secured by a mortgage must be described and "must in legal contemplation be in the minds of the parties."[39] In *Davis v. Crawford,*[40] the court held that a future advance provision in a deed of trust on the homestead did not secure a subsequent note executed by the husband alone because the future advance provision used the term "advanced them,"[41] referring to both the husband and wife, and because the wife's consent was deemed necessary to enlarge the debt on the homestead.[42] In *Walters v. Merchants & Manufacturers Bank,*[43] the court, in refusing to place limits on a dragnet clause in a deed of trust on the homestead, held that the dragnet clause was broad enough to cover subsequent debts of one of the joint grantors in the

---

[34] *Id.* at 445.

[35] 91 Miss. 825, 47 So. 113 (1908).

[36] *Id.* at 837, 47 So. at 115.

[37] *Id.* at 840, 47 So. at 116.

[38] 149 Miss. 214, 115 So. 395 (1928).

[39] *Id.* at 218, 115 So. at 397. The court framed the issue in *Campbell Brothers* as follows:

> Where a trust deed, executed on an exempt homestead by the husband and wife in favor of a bank to secure an indebtedness therein specifically described, contains the stipulation that any other sum then due the grantee or holder, or that may thereafter become due the grantee or holder by either of the grantors, shall be secured by the said trust deed, and thereafter before maturity said trust deed is assigned by the bank to a stranger to whom the husband is indebted at the date of the assignment, may the homestead property be subjected to the payment of the debt already due by the husband to the assignee, in addition to the amount of the debt assigned by the original grantee, the bank . . . .

Id. at 217, 115 So. at 396-97. The court said no, basing its answer on the reasoning that the debt foreclosed was not within the purview of the contract and was not intended to be secured because the assignee was a stranger to the contract and "[t]o hold otherwise would be to destroy the efficacy of the homestead laws of this state." *Id.* at 219, 115 So. at 397.

[40] 175 Miss. 493, 168 So. 261 (1936).

[41] *Id.* at 501, 168 So. at 262.

[42] *Id.* at 502, 168 So. at 262.

[43] 218 Miss. 777, 67 So. 2d 714 (1953).

deed of trust to the mortgagee.[44] The court in *Walters* framed the issue without mentioning the homestead aspects of the case, and later, in *Hudson v. Bank of Leakesville,*[45] the court qualified *Walters* stating that it was not decided on the theory of an increased encumbrance on the homestead by one of the joint grantors and that this question "remains undecided by any decision of this Court."[46] Dragnet clauses in deeds of trust on the homestead must be liberally construed in favor of the exemptionist,[47] and the court in *Hudson* proceeded upon the expressly stated issue of whether such a dragnet clause allows an indebtedness secured by a deed of trust on the homestead to be enlarged by one of the spouses acting without the other's knowledge or consent. However, the court failed to address this issue clearly, holding only that a dragnet clause in a deed of trust on the homestead could not secure the indebtedness of one of the joint grantors in the deed of trust to third persons unless the deed of trust provided in the clearest terms that it is intended to secure such debts.[48]

In the instant case, the court reasoned that since *Smith v. Scherck*[49] allowed one spouse to deal contractually with the deed of trust indebtedness on the homestead, and since the theory of *Walters v. Merchants & Manufacturers Bank*[50] had been to allow enlargement of the original deed of trust lien on a homestead by one spouse acting alone, the original deed of trust lien in the instant case could be enlarged by one of the joint mortgagors invoking the future advance clause to obtain a subsequent loan or future advance without the knowledge or assent of the other spouse. Relying on *Walters* and *Davis v. Crawford*[51] as establishing a requirement that dragnet clauses in deeds of trust on the homestead must be clear and unambiguous, the court held that the language of the future advance clause in the instant case was sufficiently clear and in such unambiguous terms as to secure additional loans from the bank to Mr. Jones alone. The court could find no legislative intent in the homestead statutes[52] to preclude the inclusion of a dragnet clause in a deed of trust on the homestead. In holding that the mortgage on the homestead could be enlarged

---

[44] *Id.* at 784, 67 So. 2d at 717.

The court, in refusing to limit the dragnet clause, said that limitations on the use of dragnet clauses must come from the legislature and not from the court. *Id.* at 785, 67 So. 2d at 718.

[45] 249 So. 2d 371 (Miss. 1971).

[46] *Id.* at 373.

[47] *Id.*

[48] *Id.* at 374.

The court in *Hudson* stated that such a restriction on a dragnet clause in a deed of trust on the homestead was proper, especially

> when it is considered that the enlargement of the security afforded is a direct diminution of the homestead and as such is subject to a liberal construction in favor of the exemptionist both as to common assent necessary for encumbering the homestead property and specificity of terms necessary to further encumber.

Id.

[49] 60 Miss. 491 (1882).

[50] 218 Miss. 777, 67 So. 2d 714 (1953).

[51] 175 Miss. 493, 168 So. 261 (1936).

[52] MISS. CODE ANN. §§ 85-3-21, -45, 89-1-31 (1972); *see* note 2 *supra.*

by one spouse, the court reasoned that mutual, contractual assent to such an enlargement could be given in advance through the original execution of the deed of trust providing for future advances and that the exact amount secured by the deed of trust need not be stated. Distinguishing *Hudson v. Bank of Leakesville*[53] on its facts, the court concluded that the language of *Atkinson Bacot v. Varnado*[54] was applicable in that Mr. and Mrs. Jones had bargained away their homestead.

In a lengthy dissent, Justice Robertson cogently argued that allowing one spouse to enlarge the lien on the homestead by way of future advances erodes the special protection the Mississippi Legislature has accorded the homestead by dealing with it separately from business or investment property. Quoting at length from a Kansas case,[55] Justice Robertson argued that the future advance clause could not secure Mr. Jones' new and separate loans because the trial court in the instant case had made no finding that Mr. and Mrs. Jones or the bank had intended for the deed of trust to secure payment of new and separate business loans to one spouse alone. Justice Robertson warned that the majority had opened the door for uncontrolled spousal chicanery and that the result was harsh and unconscionable and one which the legislature had specifically attempted to guard against. Justice Robertson concluded that *Davis* required the consent of both the husband and the wife to an enlargement of the debt secured by a deed of trust on the homestead and that the amount secured by the deed of trust should be stated in order to comply with the clear and unambiguous language requirements of *Hudson*.

The Mississippi Supreme Court, in the instant decision, has put the homestead in an untenable position—that of competing with economic, social and political forces which strongly influence the decisions of legislatures and courts. Throughout the history of this case the court has faced the dilemma of who is to bear the loss of the money due on the notes executed by Mr. Jones and secured by cattle he allegedly owned but which the bank could not find. The solution to the dilemma should lie either in precedent or legislative pronouncement. However, there is no statute bearing on the issues of future advances, and the case precedent is vague and conflicting. The court in *Newton County Bank* relied on *Smith v. Scherck*[56] and *Walters v. Merchants & Manufacturers Bank*[57] to justify their decision that a deed of trust on homestead property may be enlarged through new and separate loans to one spouse alone. These two cases should not be cited as authority for such a proposition. *Smith* is immediately distinguishable because it involves no future advance clause and simply stands for the proposition that a spouse may deal contractually with the debt on a homestead, not necessarily enlarge it. *Walters* is also distinguishable because it approaches the issue of future advance clauses in deeds of trust without considering the homestead aspects of the case, even though homestead property was involved. The instant decision with its superficial treatment of the homestead

---

[53] 249 So. 2d 371 (Miss. 1971).

[54] 91 Miss. 825, 47 So. 113 (1908); *see* text accompanying note 37 *supra*.

[55] Emporia State Bank & Trust Co. v. Mounkes, 214 Kan. 249, 519 P.2d 618 (1974).

[56] 60 Miss. 491 (1882).

[57] 218 Miss. 777, 67 So. 2d 714 (1953).

is following the reasoning of *Walters*. The court cites no other authority for its holding.

The court in *Newton County Bank* has added more confusion to the issues by failing to distinguish between future advance clauses and dragnet clauses.[58] These two types of future advance provisions are dissimilar in the results which they provoke when used in deeds of trust.[59] Another distinction the court fails to make which probably will be raised in future litigation is the difference between optional future advances and obligatory future advances as related to the homestead.[60] The optional-obligatory characterization, usually associated with lien priorities, also arises in the context of homestead property. The spousal chicanery which Justice Robertson noted in his dissent is much more likely to occur when one spouse knows that he or she can go to a lender under an obligatory future advance clause or dragnet clause and demand and receive advances or loans under the deed of trust regardless of necessity or motive. A requirement of contemporaneous assent of the spouses to all future advances is the solution to this problem, but this is a legislative chore with which the courts should not have to deal.

The instant decision has construed the words "all loans" in the future advance clause to mean that the deed of trust may secure new and distinct financing agreements. Inexplicably, the court in *Newton County Bank* has not considered the basic proposition set forth in the Mississippi case of *Campbell Brothers v. Bigham*[61] that the debt secured by a mortgage must, in legal contemplation, be in the minds of the parties. The court in *Campbell Brothers* refused to allow a future-advance-type clause in a deed of trust on the homestead to secure an indebtedness of one of the spouses to an assignee of the note secured by the deed of trust when that indebtedness had been created before the assignment of the note. The court reasoned that the prior indebtedness to the assignee was not within the purview of the contract and was not intended to be secured because the assignee was a stranger to the deed of trust and "[t]o hold otherwise would be to destroy the efficacy of the homestead laws of this state."[62] The analogy is that the new loans to Mr. Jones in the instant case could be considered as "strangers" to the deed of trust. This leads one to conclude that an intent on the part of the parties to the contract that the future advance clause should cover new and distinct loans cannot be found. The trial court in the instant case reached substantially the same conclusion[63] without relying on *Campbell Brothers,* yet the Mississippi Supreme Court assigned an intent to the parties which probably was not present.

The most compelling precedent involved is, of course, the first supreme court decision in *Newton County Bank v. Jones* which was overruled by the decision in the instant case. The first decision was never released for publication

---

[58] *See* notes 9 & 19 *supra*.

[59] *Id.*

[60] *See* note 9 *supra*.

[61] 149 Miss. 214, 115 So. 395 (1928); *see* note 39 *supra*.

[62] 149 Miss. at 219, 115 So. at 397.

[63] Newton County Bank v. Jones, 299 So. 2d 215, 224-25 (Miss. 1974) (Robertson, J., dissenting).

in the reporters, and the instant case, in addition to reversing the chancellor's decision, withdrew the former opinion. The first decision also had no concrete precedent on which to rely. That decision imposed a requirement of contemporaneous assent to future advances enlarging the debt on the homestead and construed the homestead statute[64] as requiring the exact amount secured to be stated in the deed of trust. The court in the first decision was extending a protective rationale toward the homestead and when faced with the judicial choice between contract and homestead chose the homestead. The first decision, by imposing a loss upon the bank, would have made bankers and lenders wary of future advance provisions in deeds of trust on the homestead, and consequently, the future advance provision might have been denied those who wished to utilize their homestead as security for loans or construction. Perhaps this potential reluctance on the part of bankers and lenders will be evident after the *Newton County Bank* decision because of the narrow margin of the majority.

Both of the *Newton County Bank* decisions are based on policy considerations; the necessity of the court's having to make such a choice could have only one source—the Mississippi Legislature. Perhaps the greatest significance of *Newton County Bank* is the clear and unmistakable signal to the legislature to deal with future advance clauses, including dragnet clauses in deeds of trust. The court in 1953 in *Walters* made it clear that the legislature should deal with the matter when the court refused to place limits on a dragnet clause in a deed of trust, saying: "Limitations if any upon the use of that clause must stem from the Legistature and not from this Court."[65] The legislature has failed to heed that plea to remove the confusion surrounding future advance law in this state. *Newton County Bank* is an example of the dilemma the courts of this state face when confronted with the prospect of allocating without guidelines the losses resulting from improvident business transactions. The legislature either has been unaware of the abuses or potential abuses of future advance clauses in deeds of trust or has been reluctant to deal with the problem. The likelihood of abuse of future advance clauses has been increased by the instant decision because, as Justice Robertson pointed out in his dissent, the door has been opened for overreaching lenders to trap unsuspecting families in a morass of debt created by an improvident spouse.

As mentioned at the outset, the most disturbing aspect of this quagmire is that the homestead is thrust into it. *Newton County Bank,* in the simplest analysis, is a contest between a contract and a human being, and the solemn contract has won. Yet the bank is but an aggregation of human beings who would have lost had the court reached a contrary result. The court in the instant case has floundered in attempting to extricate itself from this dilemma, but only because the legislature has not acted in this area. Perhaps the Mississippi Bar should take the initiative in bringing this matter to the attention of the legislature. The benefits of future advance clauses to the construction industry and to those seeking to build homes are noteworthy. However, restrictions are needed. Over one-third of the states have enacted statutes limiting the use of future

---

[64] Miss. Code Ann. § 89-1-31 (1972); *see* note 2 *supra*.

[65] Walters v. Merchants & Mfrs. Bank, 218 Miss. 777, 785, 67 So. 2d 714, 718 (1953).

advance clauses and dragnet clauses in deeds of trust or mortgages.[66] Mississippi should join them.

Eugene Clark Rumfelt

---

[66] *See* note 12 *supra*.

Constitutional Law—School Desegregation—Absent Multidistrict Constitutional Violations, There Is No Basis for a Court-Ordered Multidistrict Remedy

Respondents, the Detroit Branch of NAACP and individual parents and students, brought a class action[1] under the equal protection clause of the fourteenth amendment against the Governor of the State of Michigan, the Detroit Board of Education, and other state and local officers and boards[2] alleging that official policies and actions of state and local officials have caused the Detroit Public School System to be segregated on the basis of race. The respondents called for implementation of a desegregation plan which would eliminate "the racial identity of every school in the [Detroit] system and . . . maintain now and hereafter a unitary nonracial school system."[3] The District Court of the Eastern District of Michigan found the Detroit Board of Education guilty of operating a de jure segregated school system,[4] and, concluding that the board was a subordinate entity of the state, held the state likewise legally responsible.[5]

---

[1] The class was later defined as "all school children of the City of Detroit and all Detroit resident parents who have children of school age." Milliken v. Bradley, 94 S. Ct. 3112, 3116 (1974).

[2] Other named defendants were the State Attorney General, the State Board of Education, the State Superintendent of Public Instruction, members of the Detroit Board of Education, and the former superintendent of the Detroit Public School System.

[3] 94 S. Ct. at 3116. Respondents also sought a preliminary injunction restraining the enforcement of a recently enacted state statute, Mich. Comp. Laws Ann. § 388.182 (Supp. 1974), claiming that the statute unconstitutionally interfered with the execution and operation of a voluntary plan of partial high school desegregation, known as the April 7, 1970, Plan, which had been adopted by the Detroit Board of Education. The district court denied the injunction in an interlocutory order on September 3, 1970. This decision was appealed to the Court of Appeals for the Sixth Circuit, which affirmed in part, reversed in part, and remanded, holding, *inter alia,* that the statute was unconstitutional. Bradley v. Milliken, 433 F.2d 897 (6th Cir. 1970). On remand the respondents moved for immediate implementation of the April 7 Plan. In response to a court order, the school board offered two additional plans, giving top priority to the so-called "Magnet Plan"; the district court approved the "Magnet Plan," and respondents again appealed, moving for a summary reversal. The court of appeals refused to overrule, but remanded with instructions to proceed immediately to a trial on the merits of respondents' substantive allegations concerning the Detroit Public School System. Bradley v. Milliken, 438 F.2d 945 (6th Cir. 1971) (per curiam). Thus the trial on the issue of segregation in the Detroit Public School System began on April 6, 1971. Milliken v. Bradley, 94 S. Ct. 3112, 3116-17 (1974).

[4] Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971), *appeal dismissed,* 468 F.2d 902 (6th Cir.), *cert. denied,* 409 U.S. 844 (1972).

> A *de jure* racially segregated school system is one in which local or state school authorities deliberately and willfully establish public school attendance boundaries or regulations to enroll students in particular schools on strictly or primarily a racial basis . . . .

Shannon, *Present Direction of Court Decisions Regarding Metropolitan Area Desegregation,* 1 J.L. & Educ. 587, 588 (1972).

[5] The State of Michigan as such is not a party to this litigation and refer-

Deferring a motion to join as additional parties defendant 85 school districts in the three counties surrounding Detroit, the district court ordered the Detroit Board of Education to submit desegregation plans limited to the Detroit school district alone and ordered the state defendants to submit plans encompassing the three-county metropolitan area.[6] Upon submission of these plans, the district court concluded that the plans offered by the city board were inadequate and held that it must look beyond the limits of the Detroit school district for a solution to the problem. Accordingly, the district court designated 53 of the 85 suburban school districts in addition to Detroit as the "desegregation area" and appointed a panel to prepare and submit an effective desegregation plan for that area.[7] A divided Court of Appeals for the Sixth Circuit, sitting en banc, affirmed in part, vacated in part, and remanded for further proceedings; affirming a multidistrict remedy as "the only feasible desegregation plan,"[8] and one within the equity powers of the court. On certiorari to the United States Supreme Court, *held*, reversed, and remanded. The relief ordered by the district court and affirmed by the court of appeals was based upon an erroneous standard and was unsupported by record evidence that acts of the outlying school districts affected the discrimination found to exist in the schools of Detroit. Absent proof of multidistrict constitutional violations, a federal court cannot impose a multidistrict, areawide remedy for a single district de jure school segregation violation; the remedy directed at elimination of the segregation found to exist in the Detroit city school district accordingly must be confined to that district alone. *Milliken v. Bradley,* 94 S. Ct. 3112 (1974) (5-4 decision).

The history of school desegregation and the Supreme Court's corresponding interpretations of the equal protection clause of the fourteenth amendment began in 1896 with a decision involving not education, but transporta-

---

ences to the State must be read as references to the public officials, State and local, through whom the State is alleged to have acted.

94 S. Ct. at 3116.

[6] The board's effort to appeal these orders was dismissed by the court of appeals. Bradley v. Milliken, 468 F.2d 902 (6th Cir.), *cert. denied,* 409 U.S. 844 (1972). Again the district court was requested to grant the outlying school districts intervention. The court took the motion under advisement pending submission of the requested plans. On March 15, 1972, the district court granted the motions of the intervenor school districts, subject to several limiting conditions. 94 S. Ct. at 3120.

[7] Bradley v. Milliken, 345 F. Supp. 914 (E.D. Mich. 1972), *aff'd in part and vacated in part*, 484 F.2d 215 (6th Cir. 1973) (en banc), *rev'd*, 94 S. Ct. 3112 (1974). The trial record is void of any proof that the school districts other than Detroit were guilty of failing to operate unitary school systems within their districts, that any boundary lines of any affected school district were established with the purpose of fostering racial segregation in the public schools, or that any included district committed acts which affected segregation within the other districts. 94 S. Ct. at 3129. Also, the composition of the appointed panel included only one member from the intervening districts, as opposed to three members from the Detroit Board, despite the fact that the combined student enrollment of the 53 included outside districts was approximately 503,000, compared to Detroit's 276,000. *Id.* at 3122 & n.14.

[8] 484 F.2d 215, 249 (6th Cir. 1973).

tion—*Plessy v. Ferguson*,[9] which held racially "separate but equal" facilities constitutionally permissible.[10] Not until 1954[11] in *Brown v. Board of Education*[12] *(Brown I)*, did the Court find that separate educational facilities are inherently unequal. Thus the Court stopped comparing black schools and white schools and focused its attention upon the effect of segregation itself on public education.[13] Having found public school segregation to be a denial of equal protection of the laws, the Court was first presented the problem of remedying such denials in *Brown II*.[14] *Brown II* gave the local school authorities primary responsibility for solving the problems articulated in *Brown I*, leaving to the district courts the determination of whether the constitutional principles are properly implemented.[15] Transition from a dual system was to be effected "with all deliberate speed."[16] In 1963 the Supreme Court struck down a student self-transfer plan based solely upon racial factors,[17] and in 1964 prohibited a school system from closing down in order to avoid desegregation.[18] Freedom-of-choice plans were struck down in 1968 by *Green v. County School Board,*[19] which charged school officials with "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[20] The objective must be a system not of "a 'white' school and a 'Negro' school, but just schools."[21] In 1969 the time standard "all deliberate speed" was held no longer constitutionally permissible, and school districts were directed to begin operating unitary school systems "immediately."[22] A system is unitary when no person is effectively excluded from any school because of race or color.[23] In 1971 the Court handed down *Swann v.*

---

[9] 163 U.S. 537 (1896).

[10] Education was the subject, however, when the doctrine apparently was first litigated in the United States in Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, 206 (1849). Brown v. Board of Educ., 347 U.S. 483, 491 n.6 (1954).

[11] The Court had circumvented a direct reexamination of the "separate but equal" doctrine by findings of inequality (on the graduate school level) and thus granting relief to black plaintiffs. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Oklahoma, 332 U.S. 631 (1948); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

[12] 347 U.S. 483 (1954).

[13] *Id.* at 492.

[14] Brown v. Board of Educ., 349 U.S. 294 (1955).

[15] *Id.* at 299.

[16] *Id.* at 301.

[17] Goss v. Board of Educ., 373 U.S. 683 (1963).

[18] Griffin v. County School Bd., 377 U.S. 218 (1964). For an overview of school desegregation cases in the decade following *Brown I*, see Bickle, *The Decade of School Desegregation, Progress and Prospects,* 64 COLUM. L. REV. 193 (1964); Palmer, *The Fourteenth Amendment — Some Reflections on Segregation in the Schools*, 49 A.B.A.J. 645 (1963); Pollak, *Ten Years After*, 24 FED. B.J. 123 (1964).

[19] 391 U.S. 430 (1968). Companion cases to *Green* were Monroe v. Board of Comm'rs, 391 U.S. 450 (1968), and Raney v. Board of Educ., 391 U.S. 443 (1968).

[20] 391 U.S. at 437-38.

[21] *Id.* at 442.

[22] Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969).

[23] *Id.*

Charlotte-Mecklenburg Board of Education.[24] In *Swann* the Supreme Court, for the first time, addressed the practicalities of remedying a state-imposed dual system. The Court found: (1) It is not necessary for every school in every community always to reflect the exact racial composition of the community as a whole, but the limited use of mathematical ratios is permissible as a starting point.[25] (2) The existence of a small number of one-race or virtually one-race schools within a district is not automatically a violation, but such schools will be given close scrutiny, and the burden will be upon the school authorities to satisfy the court that such composition is constitutional.[26] (3) Without a constitutional violation there is no basis for judicially imposed remedial altering of attendance zones; given the violation, however, some pairing and grouping of attendance zones is permissible as a remedial tool.[27] (4) Local school authorities may be required to employ bus transportation as one means of school desegregation, but a valid objection to busing may be the risk to the health of the children or a significant impingement on the educational process.[28] Finally, the Court stated in *Davis v. Board of School Commissioners*,[29] a companion case to *Swann*, that the ultimate measure of any desegregation plan will be its effectiveness. A year later the Court, in *Wright v. Council of the City of Emporia*,[30] reiterated that for equal protection purposes it would look to the "effect" of state action on school segregation in determining constitutional violations. In refusing to allow a city to withdraw from the county school system to form its own system, where the existing dual school system was in the midst of transition, the Court stated that the correct test for determining the "effect" is simply "whether [state action] hinders or furthers the process of school desegregation."[31] *Wright*, though, was a 5-4 decision (the first nonunanimous major school desegregation decision handed down by the Supreme Court), and the dissent demonstrated that purpose and motive were still viable equal protection considerations to some members of the Court.[32] *Wright* is a good example of the Court's tendency, since *Brown II*, to view local boundaries as potentially flexible elements in a

---

[24] 402 U.S. 1 (1971). Companion cases to *Swann* were North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971), and Davis v. Board of School Comm'rs, 402 U.S. 33 (1971).

[25] 402 U.S. at 22-25.

[26] *Id.* at 25-27.

[27] *Id.* at 27-29.

[28] *Id.* at 29-31.

[29] 402 U.S. 33, 37 (1971).

[30] 407 U.S. 451 (1972).

[31] *Id.* at 460; *accord*, Norwood v. Harrison, 413 U.S. 455 (1973). In *Norwood*, the policy of the State of Mississippi of providing free textbooks to children enrolled in segregated private schools was held unconstitutional since "permissible purpose" can not save "impermissible effect." *Id.* at 466.

[32] The dissenters, led by Chief Justice Burger, found no impermissible motive involved in the formation of the new district. 407 U.S. at 471. The Court was unanimous, however, in a companion case where improper racial motive was clearly found to exist in the creation of the new district. United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972).

remedial plan. Inseparably coupled with this view has been the notion that the realm of the equity powers of the district courts indeed would permit such tampering, presuming the system under examination could not be effectively desegregated otherwise.[33] Of course, this theory of expansion, consolidation, or change runs contrary to the traditional concept of neighborhood schools and their desirability.[34] Prior to *Milliken v. Bradley*, the Supreme Court had not presented to the lower federal courts a definitive statement as to how to balance these competing theories. It was clear that if a school district line had been drawn with the intention of *furthering* segregation, that line could be altered;[35] but in *Spencer v. Kugler,*[36] where district lines were drawn coterminous with political boundaries, the Supreme Court summarily refused to declare them unconstitutional, even though the effect was to create racial imbalance among neighboring school districts. The crossing of school district lines was the heart of *Bradley v. School Board.*[37] In reaching its verdict denying a proposed interdistrict remedy, the court of appeals in *Bradley* found that the school district lines had not been drawn for the purpose of discrimination.[38] It also found that in Virginia the local school boards, and not the State Board of Education, had exclusive jurisdiction of desegregation problems.[39] Finally, the court of appeals concluded that "even if we were to ignore Virginia law . . . there are practicalities of budgeting and finance that boggle the mind."[40] As to the legal relationship between a state and a local school district, the Supreme Court, in *Cooper v. Aaron,*[41] said that with respect to the fourteenth amendment, a local school board is an agent of the state, and its acts are those of the state.[42] As for taking into account possible massive logistical burdens, these solutions must be contemplated within the general framework available when granting equitable relief.[43] In *Brown II,* the Court said:"traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."[44] *Green* holds that school officials are

---

[33] *See generally* Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697 (1971); Comment, *School Desegregation After Swann: A Theory of Government Responsibility*, 39 U. CHI. L. REV. 421 (1972).

[34] *See* Comment, *supra* note 33, at 444.

[35] United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972).

[36] 326 F. Supp. 1235 (D.N.J. 1971), *aff'd mem.*, 404 U.S. 1027 (1972).

[37] 338 F. Supp. 67 (E.D. Va.), *rev'd*, 462 F.2d 1058 (4th Cir. 1972), *aff'd per curiam by an equally divided Court,* 412 U.S. 92 (1973). Although *Bradley* is binding on the parties, that decision produced no authoritative precedent outside the Fourth Circuit. *See* United States v. Pink, 315 U.S. 203, 216 (1942). *See generally* 1B J. MOORE, FEDERAL PRACTICE ¶ 0.402[2], at 119 (2d ed. 1965).

[38] 462 F.2d at 1064.

[39] *Id.* at 1067.

[40] *Id.* at 1068.

[41] 358 U.S. 1 (1958).

[42] *Id.* at 16-17; *accord*, Reynolds v. Sims, 377 U.S. 533, 575 (1964).

[43] *See generally* Ragsdale, *Constitutional Approaches to Metropolitan Planning,* 5 URBAN L. 447 (1973).

[44] 349 U.S. at 300.

"clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch";[45] *Davis* states that the scope of the remedy is determined by its "effectiveness."[46] In fashioning the appropriate remedy, *Swann* said:

> The task is to correct, by a balancing of the individual and collective interests the condition that offends the Constitution.
>
> [J]udicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. . . .
>
> . . . As with any equity case, the nature of the violation determines the scope of the remedy.[47]

Vital to the Court's determination of the proper nature and scope of a remedy is the judicial policy of separating discovered racial segregation into two categories: de jure[48] segregation and de facto[49] segregation. The Supreme Court has yet to discard this distinction.[50] The Court has often expanded its interpretation of de jure segregation, however, in attempting to remedy racially segregated school systems in the North.[51] Factually, *Keyes v. School District No. 1*[52] set the stage for the Supreme Court to deliver de facto's impenetrability its *coup de grace,* but the Court's majority opinion declined this opportunity and continued to respect the de jure—de facto dichotomy.[53] As a result, imbalance in one part of the city of Denver was held de jure and within the remedial powers of the courts, while imbalance in another part was held de facto and off-limits to the courts,

---

[45] 391 U.S. at 437-38.

[46] 402 U.S. at 37.

[47] 402 U.S. at 16.

[48] *See* note 4 *supra.*

[49] [A] *de facto* racially segregated school system is one in which pupils attend schools of a predominantly racial sameness simply because they live in neighborhoods characterized by the racial sameness reflected in the student enrollment of the local public schools.

Shannon, *supra* note 4, at 588.

[50] The Supreme Court has denied certiorari on this issue numerous times. Deal v. Cincinnati Bd. of Educ., 389 U.S. 847 (1967), *denying cert. to* 369 F.2d 55 (6th Cir. 1966); Downs v. Board of Educ., 380 U.S. 914 (1965), *denying cert. to* 336 F.2d 988 (10th Cir. 1964); Bell v. School City, 377 U.S. 924 (1964), *denying cert. to* 324 F.2d 209 (7th Cir. 1963); Sealy v. Department of Pub. Instruction, 356 U.S. 975, *denying cert. to* 252 F.2d 898 (3d Cir. 1958); *see* 25 ALA. L. REV. 389, 391 nn.18 & 19 (1973). *See generally* 25 ALA. L. REV. 389 (1973).

[51] *See* Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis,* 60 CALIF. L. REV. 275 (1972).

[52] 413 U.S. 189 (1973).

[53] "We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate." *Id.* at 208. Thus even if a board's acts caused segregation, a court will not intervene unless segregative intent is shown. *Id.* at 211 n.17.

although the same school board administered both areas.[54] The dissent argued for abandonment of the distinction in lieu of a uniform standard applicable "in Denver [as well as] in Atlanta."[55]

In the instant case, the Court, in an opinion by Chief Justice Burger,[56] held that absent any finding that the outlying school districts had themselves failed to operate unitary school systems, absent any finding that any of the boundaries of the outlying districts were established with the intention of fostering racially segregated public schools, and absent any finding that the outlying districts had committed acts which effected segregation within the single city school district, there was no basis for a court-ordered multidistrict, areawide remedial plan concerned with correcting a single district de jure segregation problem. The Court advised that federal remedial power may be exercised only on the basis of a constitutional violation, and the nature of the violation necessarily determines the scope of the remedy. Here, since the constitutional violation occurred only within the Detroit school system, a remedy encompassing school systems which were constitutionally operated and established could be supported only by "a drastic expansion of the constitutional right itself, an expansion without any support in either constitutional principle or precedent."[57] In so finding, the Court acknowledged respect for local control of public school systems in this country and spoke with dismay at any prospects of district judges acting as "school superintendents" in the face of complex multidistrict operational problems. It also expressed consternation at the lack of procedural respect afforded the outlying districts throughout the course of the litigation but determined that in light of its holding, this question need not be answered.[58]

Justices Douglas, White, Brennan, and Marshall dissented. Justice Douglas argued that since the Court has already forced poorer school districts to pay much of their own way,[59] the instant decision prohibiting interdistrict relief for segregated school systems will maintain and perpetuate city cores which are economically poor and educationally identifiably black. Thus Justice Douglas, as far as equal protection is concerned, saw the Court "in a dramatic retreat"

---

[54] *See* 52 N.C.L. Rev. 431 (1973). *See generally* Note, *Segregative Intent and the Single Government Entity in School Desegregation*, 1973 Duke L.J. 1111.

[55] 413 U.S. at 219 (Powell, J., dissenting in part).

[56] The Chief Justice was joined by Justices Stewart, Blackmun, Powell, and Rehnquist.

[57] 94 S. Ct. at 3128.

[58] In his concurrence, Justice Stewart sought to explain the Court's decision as one concerning only the appropriate exercise of federal equity jurisdiction in relation to this particular set of facts, and not as a definitive, permanent bar to interdistrict remedies. An interdistrict remedy might well be appropriate, he suggested, where state officials have contributed to segregation "by drawing or redrawing school district lines, . . . by transfer of school units between districts, . . . or by purposeful racially discriminatory use of state housing or zoning laws . . . ." *Id.* at 3132. In the instant case, however, the formulation of an interdistrict remedy was simply not responsive to the factual record before the district court and was an abuse of that court's equitable powers. *Id.* at 3131-33 (Stewart, J., concurring).

[59] Justice Douglas' interpretation of San Antonio Independent School Dist. v. Rodríguez, 411 U.S. 1 (1973).

even from the 1896 doctrine of *Plessy v. Ferguson*,[60] noting that at least under *Plessy*, segregated Blacks were provided equal treatment under the Constitution. In contrast to Justice Douglas' broadly reasoned dissent, Justice White[61] concentrated on two particular majority determinations which he found unacceptable. The first was the Court's refusal to respect the district court's contention that the Detroit public school system could not be effectively desegregated without expanding the desegregation area. Since the Court historically has relied on a district court's assessments in this area, and since the district court had also expressly found that an interdistrict plan would in some ways be logistically more practical and feasible than submitted plans limited to the city district itself, Justice White found the Court's refusal to adopt a multidistrict plan arbitrary, inconsistent with its own past rulings, and a decision which cripples a district court's equity powers. Secondly, Justice White strongly dissented from the Court's refusal to treat the State of Michigan, rather than the single school district, as the governmental entity to be dealt with in formulating a satisfactory remedy. The fourteenth amendment is addressed to the states; in Michigan the school district is an agency of the state; and the state is responsible when a public agency, acting in its behalf, invidiously discriminates, argued Justice White. He concluded that the majority's misplaced respect for school district boundaries produces an arbitrary limitation on the equitable power of the federal district courts and prevents the state from assuming its proper responsibility for remedying constitutional wrongs within its borders. In the final dissent, Justice Marshall[62] asserted that the most serious analytical flaw of the Court's opinion is the failure to confront, or respond to, the district court's conclusion that a remedy limited to the city of Detroit would not effectively desegregate the Detroit city schools. Justice Marshall viewed the Court's remand for formulation of a decree to end the segregation found to exist in the Detroit city schools to be a great irony. Like Justice White, Marshall perceived no basis either in law or in the practicalities of the situation to justify the state's interposition of school district boundaries as absolute barriers to the implementation of an effective remedy. He parried the Court's respect for local control of public schools with evidence from the State of Michigan's constitution and statutes pointing toward state control. Finding the state primarily responsible for correcting the Detroit violation, Justice Marshall required no finding of fault on the part of the outlying districts as a prerequisite to their involvement in the remedy. In short, Justice Marshall refused to "subscribe to this emasculation of our constitutional guarantee of equal protection of the laws . . . ."[63]

Although in the instant case the Court remanded for "prompt formulation of a decree directed to eliminating the segregation found to exist in the Detroit city schools,"[64] surface analysis discloses that this decision will not be labeled a step forward in the march toward total desegregation of the nation's public

---

[60] 163 U.S. 537 (1896).

[61] Joined by Justices Douglas, Brennan, and Marshall.

[62] Joined by Justices Douglas, Brennan, and White.

[63] 94 S. Ct. at 3145-46 (Marshall, J., dissenting).

[64] *Id.* at 3131.

school systems. Justice Marshall maintained that "[a]fter 20 years of small, often difficult steps toward that great end, the Court [with this decision] takes a giant step backwards. . . ."[65] A more vital question remains: Is that march, begun in *Brown I,* now over? In establishing school district lines as concrete barriers to metropolitan remedial plans, the Court has severely limited the flexibility of the equity-based powers of the federal district courts. In holding the school district, and not the state, accountable for effectively remedying unconstitutional racial imbalances, the Court has shifted the burden of responsibility from the shoulders of the political division originally given that responsibility by the Constitution.[66] In *Milliken,* the state was shown to have the power to sustain that responsibility.[67] In refusing to reject the de jure-de facto segregation distinction, the Court continues to require northern plaintiffs to prove that the school boards have intentionally and purposefully created by their actions the sort of segregation banned in the South by *Brown I.*[68] In reaching these determinations, the Court did not fashion new concepts or impose new criteria; "the nature of the violation determines the scope of the remedy" comes directly from *Swann.*[69] The significance of the decision lies in its severe limitation of that scope. Perhaps this severity can be explained best as a reaction by a politically conscious Court to a perceived public mood that the Court has "gone far enough"[70] in approving plans requiring extensive busing. The antibusing provisions of the Education Amendments Act of 1972[71] and the congressional hearings on a proposed constitutional amendment prohibiting the busing of students in order to overcome racial imbalance[72] have provided the Court with an indication of legislative reaction to intense constituent dissatisfaction. Northern cities sometimes are still scenes of turmoil in the face of mass, forced busing.[73] But an examination of Chief Justice Burger's dissent in *Wright v. Council of the City of Emporia*[74] shows the Chief Justice and Justices Blackmun, Powell, and Rehnquist arguing many of the same positions and theories used in the Court's opinion in the instant case. From the qualifying language of *Swann,* to *Wright,* through *Spencer v. Kugler,*[75] it is not as much busing as the underlying judicial

---

[65] *Id.* at 3145.

[66] *See* Comment, *supra* note 33, at 440-47; Note, *Consolidation for Desegregation: The Unresolved Issue of the Inevitable Sequel,* 82 YALE L.J. 1681 (1973).

[67] 92 S. Ct. at 3134 nn.1-5, 7 (Douglas, J., dissenting).

[68] *See* 52 N.C.L. REV. 431, 434 (1973).

[69] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

[70] 94 S. Ct. at 3161 (Marshall, J., dissenting).

[71] 20 U.S.C. §§ 1651-56 (Supp. II, 1972).

[72] *Hearings on Proposed Amendments to the Constitution and Legislation Relating to Transportation and Assignment of Public School Pupils Before Subcomm. No. 5 of the House Comm. on the Judiciary,* 92d Cong., 2d Sess., ser. 32, pts. 1-3 (1972). For an exhaustive examination of legislative and executive action against court-ordered busing, see Comment, *Congress and the President Against the Courts: Busing As a Viable Tool for Desegregation,* 19 WAYNE L. REV. 1485 (1973).

[73] *See, e.g.,* N.Y. Times, Sept. 16, 1974, at 14, col. 1 (city ed.) (mass busing provokes riots in Boston).

[74] 407 U.S. 451, 471-82 (1972) (Burger, C.J., dissenting).

[75] 404 U.S. 1027 (1972).

theories which mandate busing that draw their fire. The consistency in their reasoning gives it substance, and the instant decision gives this substance weight. The impact of that weight should be observable in the near future, as suits seeking interdistrict relief currently are pending in several cities across the nation.[76] The logical response to *Milliken* by future plaintiffs in these suits is to attack specifically one outlying school district at a time, concentrating on the elements suggested by Justice Stewart which might lead to an interdistrict remedy. For example, a showing "that state officials had contributed to the separation of the races by drawing or redrawing school district lines . . . ; by transfer of school units between districts . . . ; or by purposeful racially discriminatory use of state housing or zoning laws"[77] apparently would be sufficient grounds for including the districts so involved within a multidistrict remedial plan. Parties seeking a multidistrict plan would test the outlying district using an examination process similar to that used in *Keyes* for expanding relief within that single district. They should insist on the expansion of the Court's concept of de jure segregation in proving that the different racial compositions of the contiguous districts were "imposed, fostered, or encouraged"[78] by the state or its political subdivisions, thus warranting appropriate judicial relief. In order to prove a violation meriting multidistrict relief, future plaintiffs must fire well-prepared, well-aimed rifle shots at specific outlying districts, rather than depending upon the factually unsupported shotgun method utilized in the instant case.

Regardless of its immediate repercussions, however, the Court's opinion refuses to confront one future dilemma whose solving will bear enormous consequences: Given that "separate" is inherently unequal, and that district lines will remain untouchable barring violation on the part of the district itself, how will the Court apply the equal protection clause two decades from now when the student population of the Detroit district is virtually 100-percent black, assuming the present population trend continues?[79] The predicament well may become reality. By respecting the de jure—de facto distinction, the Court in *Keyes* said, in plain terms that Whites might be able to get far enough away from core

---

[76] Suits are pending in Hartford, Connecticut; Louisville, Kentucky; Wilmington, Delaware; Indianapolis, Indiana; Durham, North Carolina; Atlanta, Georgia; Grand Rapids, Michigan; and Cincinnati, Cleveland, and Dayton, Ohio. 43 U.S.L.W. 3105 (1974).

[77] Milliken v. Bradley, 94 S. Ct. 3112, 3132 (1974) (Stewart, J., concurring).

[78] *Id.* at 3133.

[79] If the present trend continues, the percentage of black students in the Detroit Public Schools in 1975-1976 will be 72 percent, in 1980-1981 it will be 80.7 percent, and in 1992 it will be virtually 100 percent. Bradley v. Milliken, 338 F. Supp. 582, 585 (E.D. Mich. 1971).

Considered in broader terms:

> [W]hen the percentage of Negro pupils in a given school approaches 40, more or less, the white exodus becomes accelerated and irreversible. Therefore, resegregation rapidly occurs, and the entire central core of the involved city develops into a virtually all-Negro city . . . .

United States v. Board of School Comm'rs, 332 F. Supp. 655, 676 (S.D. Ind. 1971); *see* Ragsdale, *supra* note 43, at 452.

districts to avoid immediate school desegregation. To this the instant case adds that if the school district is neutrally established and is unitary in its operation, no court-ordered desegregation plans will include it. To the remedial standard of *Davis*, "The measure of the remedy is its effectiveness," the Court now adds this qualification—"within that district alone." As for the "root and branch" elimination commanded by *Green*, the Court now cuts the branches at the district lines. Is the desegregation march over? Future decisions may give new answers,[80] but while *Milliken v. Bradley* remains the standard bearer, those seeking new frontiers in the school desegregation arena must march in place.

Jack Raymond Reed, Jr.

---

[80] The Court recently declined to review the Third Circuit's affirmance of a district court order which dismissed as untimely a motion by local districts seeking to intervene in a suit requiring an areawide remedy. Churchill Area School Dist. v. Hoots, 43 U.S.L.W. 3202 (U.S. Oct. 15, 1974), *denying cert. to* 495 F.2d 1095 (3d Cir. 1974).

COMMERCIAL LAW—PAROL EVIDENCE—ADDITIONAL TERMS ARE INADMISSIBLE TO VARY OR CONTRADICT AN INTEGRATED WRITING

Logan-Dees Chevrolet-Buick, Inc., sued Keith Noble in county court to recover a portion of the purchase price of a new car which allegedly was unpaid. The suit charged Noble with breaching an oral agreement that the parties had made prior to the execution of the written contract. The oral agreement required Noble to deliver the proceeds of an insurance check to the dealer as part of the consideration involved in the transaction.[1] The sales contract, which expressly declared that it was a complete and final statement of the terms of the agreement,[2] showed the consideration to be paid by Noble[3] but failed to mention the insurance check. At the trial, a salesman was allowed to testify that the agreement had in fact been made. Noble objected to the testimony on the grounds that it was an attempt to alter the terms of the agreement by introduction of parol evidence. This objection was overruled and judgment was entered against Noble and later affirmed by an order of the circuit court. The plaintiff contended that the oral agreement was a consistent additional term to the contract and admissible under section 75-2-202(b) of the Mississippi Code.[4] On appeal

---

[1] The dealer alleged that he sold Noble a 1972 Buick Electra for the following consideration: trade-in of one 1970 Chevrolet El Camino which had been wrecked, trade-in of one 1971 Dodge Charger, delivery of the proceeds of an insurance check covering the wrecked vehicle in the amount of $1,532.66, and payment of $2,150 cash. It is further alleged that he delivered the new auto to Noble and accepted the trade-ins and payment of $2,150 with Noble's oral promise that he would turn over the insurance check as soon as he received it.

[2] The contract, called a "Retail Buyers Order," was signed by both parties and contained the following merger clause: "The front and back of this order comprises the entire agreement pertaining to this purchase and no other agreement of any kind, verbal understanding or promise whatsoever, will be recognized." Noble v. Logan-Dees Chevrolet-Buick, Inc., 293 So. 2d 14, 15 (Miss. 1974).

[3] In the contract, the automobile purchased by the appellant was described only by its stock number, model and color, and it was stated that the following consideration was to be paid:

Total cash price		$6,615.00
Cash down payment	46.40	
Used car allowance	4,418.60	
		4,465.00
Balance payable		$2,150.00

Id.

[4] MISS. CODE ANN. § 75-2-202(b) (1972). This section adopted section 2-202(b) of the Uniform Commercial Code [hereinafter cited as UCC] which states:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented . . . (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

This section was formally adopted in Act of May 31, 1966, ch. 316, § 2-202, [1966] Gen. Laws Miss. 445 (effective March 31, 1968).

to the Mississippi Supreme Court, *held*, reversed and rendered. If parties to a contract have deliberately put the terms of their bargain into an integrated agreement, the writing is the only evidence of that agreement, and, unless there is a showing of fraud or mistake, parol evidence is inadmissible to alter or add to the terms of the writing. *Noble v. Logan-Dees Chevrolet-Buick, Inc.*, 293 So. 2d 14 (Miss. 1974).

The parol evidence rule is one of the few legal principles which has been unanimously recognized in the United States.[5] Although the rule can be simply stated, it "is in fact a maze of conflicting tests, subrules and exceptions adversely affecting both the counseling of clients and the litigation process."[6] It is now generally accepted that the rule is not a rule of evidence, but one of substantive contract law defining the limits within which to interpret the subject matter of the contract in question.[7] As an Anglo-American legal principle, the parol evidence rule began to develop around the latter part of the Middle Ages and has only recently gained complete recognition.[8] The most significant factor stimulating the growth of the rule during its infancy was the expanded use of the seal.[9] Once a person had affixed his seal to a document, he lost the power to contest the terms of that document as the actual terms of the transaction. The testimony of witnesses who were present at the consummation of the transaction became inadmissible in litigation involving the document, although prior to the use of seals such testimony had been necessary to prove the terms of the writing.[10] With the enactment of the Statute of Frauds in 1678, these precepts were expanded to include agreements which were not under seal but had been put into writing and signed by the parties.[11] Support for the rule has grown out of a desire to preserve the integrity and stability of written contracts and a great distrust of unsophisticated jurors.[12] However, legal scholars have severely criti-

---

[5] Note, 11 ENG. RU. CAS. 225 (1897).

[6] Sweet, *The Parol Evidence Rule: Diagnosis and Treatment of a Sick Rule*, 53 CORNELL L. REV. 1036 (1968). *See also* J. THAYER, PRELIMINARY TREATISE ON EVIDENCE UNDER THE COMMON LAW 390 (1898).

[7] *See* 3 A. CORBIN, CONTRACTS § 573 (1960) [hereinafter cited as CORBIN]; 4 W. JAEGER, WILLISTON ON CONTRACTS § 631 (3d ed. 1961) [hereinafter cited as WILLISTON]; RESTATEMENT OF CONTRACTS § 237, comment *a* at 332 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 239, comment *a* at 546 (Tent. Drafts Nos. 1-7, 1973); 9 J. WIGMORE, EVIDENCE § 2425 (3d ed. 1940) [hereinafter cited as WIGMORE].

[8] WIGMORE § 2426. Professor Wigmore has divided the development of the parol evidence rule into three periods:

> I, from primitive times till the vogue of the seal, in the 1200's;
> II, then on English soil, till the statute of frauds and perjuries, in 1678;
> III, and, thence its modern recognition.

Id. at 80.

[9] *Id.* at 83-84.

[10] *Id.*

[11] *Id.* at 90-91.

[12] *See* Zell v. American Seating Co., 138 F.2d 641 (2d Cir. 1943), *rev'd mem.* 322 U.S. 709 (1944) (discusses and analyzes the rule at length); C. MCCORMICK, EVIDENCE §§ 210-11 (1954); J. THAYER, *supra* note 6, at 409-10; WIGMORE § 2426; Note, *The Parol Evidence Rule: Is it Necessary?*, 44 N.Y.U.L. REV. 972, 982-83 (1969).

cized this reasoning because of the injustices it has caused.[13]

Once negotiating parties have reduced the terms of their agreement to a completely integrated writing, the parol evidence rule operates to exclude all extrinsic evidence of prior or contemporaneous agreements which would vary, add to, or alter the terms of the written instrument unless there is a showing of fraud, duress, or mistake.[14] A writing becomes integrated when the parties to the agreement intend the writing to be a complete and final statement of all the terms of their bargain.[15] Thus the court first must determine the intent of the parties before the rule operates to preclude the admission of extrinsic evidence. The confusion which has been caused by the parol evidence rule is the result of the application by the courts of a variety of tests to determine the intent of the parties.[16] The traditional four-corners test is described in an early Minnesota case.[17]

> The only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself. If it imports on its face to be a complete expression of the whole agreement . . . it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed.[18]

---

[13] *See* Zell v. American Seating Co., 138 F.2d 641, 644-45 (2d Cir. 1943), *rev'd mem.* 322 U.S. 709 (1944); WIGMORE § 2431; Note, *supra* note 12, at 972-73, 982-83. *See generally* Calamari & Perillo, *A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 IND. L.J. 333, 333-44 (1968); Sweet, *supra* note 6, at 1036-60.

[14] *See* Allen v. Allen, 175 Miss. 935, 168 So. 658 (1936); CORBIN § 573; RESTATEMENT OF CONTRACTS § 237 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 239 (Tent. Drafts Nos. 1-7, 1973); WILLISTON § 631.

[15] RESTATEMENT OF CONTRACTS § 228 (1932).

> When the parties to a written contract have agreed to it as an "integration"—a complete and final embodiment of the terms of an agreement—parol evidence cannot be used to add to or vary its terms.

Masterson v. Sine, 68 Cal. 2d 222, 436 P.2d 561, 563, 65 Cal. Rptr. 545, 547 (1968).

[16] *See, e.g.,* Royal Indus. Inc. v. St. Regis Paper Co., 420 F.2d 449 (9th Cir. 1969) (applying Corbin's rationale); Thompson v. Libbey, 34 Minn. 374, 26 N.W. 1 (1885) (applying four-corners doctrine); Valley Mills v. Southeastern Hatcheries, Inc., 245 Miss. 71, 145 So. 2d 698 (1962) (applying the reasonable man test of Professor Williston and the *Restatement of Contracts*); Zwierzycki v. Owens, 499 P.2d 996 (Wyo. 1972) (applying UCC § 2-202).

Recently a number of writers have tried to clarify the ambiguities which exist. *See* Calamari & Perillo, *supra* note 13, at 333-45; Murray, *The Parol Evidence Rule: A Clarification*, 4 DUQUESNE L. REV. 337 (1966); Sweet, *supra* note 6, at 1036-60; 25 WASH. & LEE L. REV. 265 (1968).

Some jurisdictions have conflicting tests being applied by their appellate courts. Illinois is one such jurisdiction. *Compare* Grotz v. Jerutis, 13 Ill. App. 3d 543, 301 N.E.2d 60 (1973), *with* Storybook Homes, Inc. v. Carlson, 19 Ill. App. 3d 579, 312 N.E.2d 27 (1974).

[17] Thompson v. Libbey, 34 Minn. 374, 26 N.W. 1 (1885).

[18] 26 N.W. at 2.

Professor Williston advocated,[19] and the *Restatement of Contracts* adopted,[20] a less restrictive variation of the four-corners test. This test would determine objectively the intent of the parties by presuming a written instrument to be a complete and exclusive statement of the terms of the parties' bargain unless there are alleged additional terms which the parties might naturally include in a collateral agreement, provided that such terms do not alter, vary, or contradict the writing.[21] Under either of these tests a statement, usually called a merger clause, declaring that all the terms of the agreement are embodied in the writing is usually conclusive of the issue of intent.[22] Either the four-corners test or the Williston variation is used in a majority of jurisdictions to determine whether or not the parties intended their written agreement to be a totally integrated instrument.[23] Prior to the adoption of the Uniform Commercial Code, decisions in Mississippi reflected the Williston approach.[24] Professor Corbin formulated a third test. In seeking the actual intent of the parties, he renounced the belief that a writing alone can ever be determinative of the issue of the parties' intent[25] even if the contract contains a merger clause.[26] His theory allows the trial judge to make a preliminary finding of fact on the issue of the parties' intent that the writing should be a total integration.[27] This ruling would come after the judge has heard the relevant evidence concerning the circumstances surrounding the transaction. If the judge determines the writing to have been a complete and exclusive statement of the terms of the bargain reached by the parties, the rule would operate to exclude other evidence from the jury.[28] A number of courts,[29]

---

[19] *See* WILLISTON §§ 633, 638.

[20] *See* RESTATEMENT OF CONTRACTS §§ 237, 240 (1932).

[21] *See* WILLISTON § 638.

[22] *See, e.g.*, Stribling Bros. Mach. Co. v. Girod, 239 Miss. 488, 124 So. 2d 289 (1960); Sanders v. Allis Chalmers Mfg. Co., 237 S.C. 133, 115 S.E.2d 793 (1960); Hathaway v. Ray's Motor Sales, Inc., 127 Vt. 279, 247 A.2d 512 (1968); Nettles v. Imperial Distrib., Inc., 152 W. Va. 9, 159 S.E.2d 206 (1968).

[23] *See, e.g.*, Dunlop Tire & Rubber Corp. v. Thompson, 273 F.2d 396 (8th Cir. 1959); Hartford Fire Ins. Co. v. Shapiro, 270 Ala. 149, 117 So. 2d 348 (1960); Nuquist v. Bauscher, 71 Idaho 89, 227 P.2d 83 (1951); Ross Seed Co. v. Sturgis Implement & Hardware Co., 297 Ky. 776, 181 S.W.2d 426 (1944); Finnerty v. Reed, 312 N.E.2d 578 (Mass. App. Ct. 1974); Gianni v. R. Russel & Co., 281 Pa. 320, 126 A. 791 (1924).

Some of these states may apply a more liberal test with regard to sales contracts due to a liberal interpretation of UCC § 2-202. *See* cases cited note 40 *infra*.

[24] *See, e.g.*, Freeman v. Continental Gin Co., 381 F.2d 459 (5th Cir. 1967); Valley Mills v. Southeastern Hatcheries, Inc., 245 Miss. 71, 145 So. 2d 698 (1962); King v. Ainsworth, 225 Miss. 248, 83 So. 2d 97 (1955).

[25] CORBIN §§ 581-83.

[26] *Id.* § 582. A few courts have applied this theory and have held that although a merger clause is persuasive, it is not conclusive proof of the parties' intent. *See, e.g.*, Rinaudo v. Bloom, 209 Md. 1, 120 A.2d 184 (1956); International Milling Co. v. Hachmeister, 380 Pa. 407, 110 A.2d 186 (1955), *analyzed in* CORBIN § 582, at 458.

[27] *Cf.* CORBIN § 586.

[28] *Id.* §§ 581-83.

[29] *See, e.g.*, Brown v. Financial Serv. Corp., Int'l, 489 F.2d 144 (5th Cir. 1974); Royal Indus. v. St. Regis Paper Co., 420 F.2d 449 (9th Cir. 1969); Rinaudo v. Bloom, 209 Md. 1, 120 A.2d 184 (1956); International Milling Co. v. Hachmeister, 380 Pa. 407, 110 A.2d 186 (1955); Barovic v. Cochran Elec. Co., ___ Wash. App. ___, 524 P.2d 261 (1974).

as well as the *Restatement (Second) of Contracts*,[30] have adopted this reasoning.

When the Uniform Commercial Code was drafted, the parol evidence rule was codified in section 2-202. The statement of the rule by the UCC and the one expounded by the courts at common law are substantially the same.[31] However, the UCC no longer holds that a single writing is required in order for an integrated agreement to exist.[32] The draftsmen of the UCC did not expressly adopt a method for determining the critical issue of whether or not the parties intended the writing to be complete and final. As a result, a number of courts have continued to follow the restrictive tests which prevailed in their jurisdiction before the adoption of the UCC[33] thereby preserving the power to exclude extrinsic evidence of additional terms by the insertion of a merger clause or a disclaimer into the contract.[34] This approach is contrary to the apparent intent of the draftsmen of the UCC.[35] By rejecting the presumption that a writing is a total integration of the agreement between the parties, the UCC is intended to

---

[30] RESTATEMENT (SECOND) OF CONTRACTS §§ 235-36, 239-40 (Tent. Drafts Nos. 1-7, 1973). A comprehensive reading of these sections and the comments will reveal Professor Corbin's influence.

[31] *See, e.g.*, Port City Constr. Co. v. Henderson, 48 Ala. App. 698, 266 So. 2d 896 (1972) (UCC is but a certification of common-law principles); Green Chevrolet Co. v. Kemp, 248 Ark. 62, 406 S.W.2d 142 (1966) (section 2-202 codified the rule in Arkansas); Thrifty Rent-a-Car Sys. v. Chuck Ruwart Chevrolet, Inc., 500 P.2d 172 (Colo. Ct. App. 1972) (parol evidence rule is codified by UCC, not changed).

After studying the language of section 2-202, several commentators have concluded that the substance of the rule remains unchanged. *See* Squillante, *Commercial Code Review: A Summary of Leading Decisions and Articles*, 78 COM. L.J. 89 (1973); Comment, *An Anatomy of Sections 2-201 and 2-202 of the Uniform Commercial Code (The Statute of Frauds and the Parol Evidence Rule)*, 4 B.C. IND. & COM. L. REV. 381, 391-97 (1963); Note, *The Parol Evidence Rule: The Advent of the Uniform Commercial Code in Iowa*, 52 IOWA L. REV. 512, 530 (1966).

[32] *See, e.g.*, Stern & Co. v. State Loan & Fin. Corp., 238 F. Supp. 901 (D. Del. 1965); Board of Trustees v. American Hosp. Supply Corp., 49 Mich. App. 106, 211 N.W.2d 561 (1973).

UCC § 2-202 states that "Confirmatory Memoranda" to which the negotiating parties have agreed are also subject to the operation of the parol evidence rule.

[33] *See, e.g.*, Associated Hardware Supply Co. v. Big Wheel Distrib. Co., 355 F.2d 114 (3d Cir. 1965); Port City Constr. Co. v. Henderson, 48 Ala. App. 698, 266 So. 2d 896 (1972); Green Chevrolet Co. v. Kemp, 248 Ark. 62, 406 S.W.2d 142 (1966); Childers & Venters, Inc. v. Sowards, 460 S.W.2d 343 (Ky. 1970); Whirlpool Corp. v. Regis Leasing Corp., 29 App. Div. 2d 395, 288 N.Y.S.2d 337 (1968).

[34] *See, e.g.*, Intermar, Inc. v. Atlantic Richfield Co., 364 F. Supp. 82 (E.D. Pa. 1973); Eiberger v. Martel Electronic Sales, Inc., 125 Ga. App. 253, 187 S.E.2d 327 (1972); Remley v. Susselman, 33 Pa. D. & C.2d 112 (Montgomery County Ct. 1963); Santos v. Mid-Continent Refrig. Co., 469 S.W.2d 24 (Tex. Civ. App.), *aff'd*, 471 S.W.2d 568 (Tex. 1971); Tracy v. Vinton Motors, Inc., 130 Vt. 512, 296 A.2d 269 (1972).

Although merger clauses are the subject of much controversy, some writers feel that one which is properly drafted will and should be given legal effect under section 2-202. *See* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 2-12 (1972); Squillante, *supra* note 31, at 91 n.182; Note, *Contract Draftsmanship Under Article Two of the Uniform Commercial Code*, 112 U. PA. L. REV. 564, 565-67 (1964).

[35] *See* UCC § 2-202, comment 1(a).

ease the broad exclusionary effect of the parol evidence rule and liberalize its rigid application.[36] Section 2-202 deems a writing to be but a partial integration which may be supplemented by consistent additional terms[37] unless the alleged term is one which the parties certainly would have included in the document.[38] However, the court may find that the parties intended the writing to be a final, complete, and exclusive statement of their bargain. In that situation, all additional terms are excluded.[39] In order to find such intent, it is necessary that the judge hear all relevant evidence and make a specific finding of the fact as to the parties' intent, even where a merger clause or disclaimer is contained in the contract.[40]

In the instant case, the court reasoned that since the delivery of the check was a term which the parties would have included in the contract had they agreed to the term[41] and that since the testimony, if admitted, would show a

---

[36] *See, e.g.,* Michael Schiavone & Sons v. Securalloy Co., 312 F. Supp. 801 (D. Conn. 1970); Board of Trustees v. American Hosp. Supply Corp., 49 Mich. App. 106, 211 N.W.2d 561 (1973); Symonds v. Adler Restaurant Equip. Co., 6 UCC Rep. Serv. 808 (Okla. 1969); Zwierzycki v. Owens, 499 P.2d 996 (Wyo. 1972). This presumption is the essential element of the four-corners test and its variations. *See* notes 19-27 and accompanying text *supra. See generally* J. WHITE & R. SUMMERS, *supra* note 34, § 2-10.

[37] *See, e.g.,* Braund, Inc. v. White, 486 P.2d 50 (Alas. 1971); MacGregor v. McReki, Inc., 30 Colo. App. 196, 494 P.2d 1297 (1972); Flamm v. Scherer, 40 Mich. App. 1, 198 N.W.2d 702 (1972) (allowed admission of additional term despite presence of merger clause); McDown v. Wilson, 426 S.W.2d 112 (Mo. App. 1968); Hunt Foods & Indus., Inc. v. Doliner, 26 App. Div. 2d 41, 270 N.Y.S.2d 937 (1966). *See also* Broude, *The Consumer and the Parol Evidence Rule: Section 2-202 of the Uniform Commercial Code*, 1970 DUKE L.J. 881, 903, *quoting* N.Y. LAW REVISION COMM'N, STUDY OF UNIFORM COMMERCIAL CODE 598-601 (1955). See Comment, *"Consistent Additional Terms" Within Section 2-202(b) of the Uniform Commercial Code*, 12 N.Y.L.F. 520, 529 (1966), where one commentator states:

> The Code's effect is to change a judicial fact finding process left solely to the judge's determination to a legislative presumption that the parties to an agreement for the sale of goods have not intended a complete integration even where the writing is apparently complete. Under the Code, the court must specifically find to the contrary in order to overcome this legislative presumption of partial integration.

[38] UCC § 2-202, comment 3.

[39] UCC § 2-202.

[40] *See, e.g.,* Pacific Indem. Co. v. McDermott Bros. Co., 336 F. Supp. 963 (M.D. Pa. 1971); Braund, Inc. v. White, 486 P.2d 50 (Alas. 1971); Cuinei v. Wella Corp., 26 App. Div. 2d 109, 271 N.Y.S.2d 917 (1966); Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972); Golden Gate Corp. v. Barrington College, 98 R.I. 35, 199 A.2d 586 (1964) (applying UCC § 2-202 to a lease by analogy); Zwierzycki v. Owens, 499 P.2d 996 (Wyo. 1972). *See also* General Equip. Mfrs. v. Bible Press, Inc., 10 Mich. App. 676, 160 N.W.2d 370 (1968); Hull-Dobbs, Inc. v. Mallicoat, 57 Tenn. App. 100, 415 S.W.2d 344 (1966) (dictum); Wisconsin Dairy Fresh, Inc. v. Steel & Tube Prods. Co., 20 Wis. 2d 415, 122 N.W.2d 361 (1963).

[41] In the words of the court:

> If Logan-Dees expected to receive the proceeds of the insurance check as part of the consideration for the car sold to Noble, it would have been a very simple matter to include such a provision in the contract.

293 So. 2d at 15.

consideration different from that expressed in the writing, then the evidence was not admissible under section 75-2-202(b)[42] as a consistent additional term. Furthermore, the court found that since the contract expressly declared itself to be a total integration, the parol evidence rule operates to exclude evidence of all additional terms. The court further held that since the parties deliberately had put their agreement into writing, the written agreement alone was the evidence of their bargain, and, without a showing of fraud or mistake, the trial court had erred by allowing Logan-Dees to admit evidence of the oral agreement.

The instant case presented the Mississippi Supreme Court with its first opportunity to determine what effect the parol evidence rule of the UCC would have on the law of contracts in Mississippi. In its brief opinion the court did not openly address the problem which confronts most trial courts when faced with an objection to the admission of certain evidence as being violative of the parol evidence rule: What is the correct procedure for the court to follow when trying to determine whether the writing is or is not an integrated agreement? Although the court failed to cite any case law to support the rationale for its decision, it can be inferred from the language in the opinion that it has endorsed the objective determination of intent which prevailed prior to the adoption of the UCC in Mississippi.[43] Following that approach, it seems that the insertion of a merger clause into the terms of the agreement would conclusively determine the question of the parties' intent.[44] There is dicta in the opinion, however,

[42] MISS. CODE ANN. § 75-2-202(b) (1972).

[43] In his opinion Justice Sugg states: "Where parties, without any fraud or mistake, have deliberately put their contract in writing, the writing is not only the best, but the only, evidence of their agreement." 293 So. 2d at 15.

Similar language can be found in several older decisions which were handed down before the adoption of the UCC and under the four-corners test or one of its variations. In Wren v. Hoffman, 41 Miss. 616 (1868), one of the cases which laid the foundation for the parol evidence rule in Mississippi, the court held: "When parties have deliberately put their engagements into writing in such terms as import a legal obligation, it is conclusively presumed that the whole engagement of the parties . . . was reduced to writing . . . ." *Id.* at 619-20.

In another case, Bank of Lena v. Slay, 176 Miss. 825, 170 So. 635 (1936), the court held: "[W]hen parties have deliberately put their agreement in writing, it will be presumed that the whole contract is embodied in such writing . . . ." *Id.* at 829, 170 So. at 636.

When the court in *Logan-Dees* noted that: "If Logan-Dees expected to receive the proceeds of the insurance check as part of the consideration . . . it would have been a very simple matter to include such a provision in the contract . . . ." 293 So. 2d at 15, the court seemed to be classifying the term alleged by Logan-Dees to be one which the parties naturally would have included in the terms of the agreement thus suggesting a *Restatement*-type test. *See* notes 19 through 21 and accompanying text *supra*.

[44] The court found that parol evidence of additional terms was inadmissible because "the contract, by its own terms, was a complete and exclusive statement of the terms of the agreement of the parties." 293 So. 2d at 15. This reasoning conforms to a line of decisions handed down before the adoption of the UCC. *See, e.g.*, Perrault v. White Sewing Mach. Co., 157 Miss. 167, 127 So. 271 (1930); J.R. Watkins Co. v. Poag, 154 Miss. 22, 122 So. 473 (1929); J.B. Colt Co. v. Odom, 136 Miss. 651, 101 So. 853 (1924).

which supports an argument to the contrary. In his closing sentence, Justice Sugg appears to acknowledge the difference between the common law approach to the exclusion of extrinsic evidence and the rule promulgated by the UCC.[45] As a result, the precedential value of the instant case may be limited to the facts of the case while the court awaits the proper controversy in which to expound the differences between the two rules.

In the modern commercial environment, there can be little justification for adherence to the restrictive doctrines which the majority of courts have followed under the common law. The primary weakness of the exclusionary effects which result from application of the four-corners doctrine and its variations is that it allows a party to the agreement to evade a legal obligation which he had willingly accepted during the negotiation process. Because of the widespread use of disclaimers and merger clauses, such results are commonplace in litigation arising out of the ordinary consumer transaction.[46] A more subjective approach to determine intent would not completely eliminate these injustices, but it would severely decrease the probability of their occurrence in the future. By allowing the trial judge to hear extrinsic evidence of the alleged additional terms and the circumstances surrounding the transaction, the court would be able to reach a more accurate determination of the actual terms of the bargain reached by the parties. When studying the evidence, the trial judge should consider a merger clause as strong but inconclusive evidence of the parties' intent.[47] This would not result in the demise of the parol evidence rule, as was feared by Professor Williston,[48] since the evidence would be kept from the trier of fact if the writing is found to be an integrated agreement. Had this test been applied in the instant

---

[45] We hold that the court erred in receiving parol evidence to vary the terms of the written contract and that the parol evidence was not admissible either under MISS. CODE ANN. § 75-2-202 (1972) *or* under the common-law parol evidence rule.

293 So. 2d at 15-16 (emphasis added).

Also influencing the court's decision may have been the fact that under Mississippi law a contract is to be construed most strongly against the drafter. Love Petroleum Co. v. Atlantic Oil Producing Co., 169 Miss. 259, 152 So. 829 (1934).

[46] Two recent articles discussing the effects of section 2-202 on the consumer are Broude, *supra* note 37; Shanker & Abel, *Consumer Protection Under Article 2 of the Uniform Commercial Code*, 29 OHIO ST. L.J. 689 (1968).

It should be remembered that UCC § 2-202 must be read in conjunction with section 2-302. For a good example of how the injustice which is often caused by the parol evidence rule can be avoided by using section 2-302, see Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971) (applying UCC to lease by analogy).

[47] In defending this position, Professor Corbin has stated that if a judge "should find the offered testimony, after listening to it, so flimsy and improbable as to justify a directed verdict," then one should be given. Thus the effective operation of the rule rests upon a sound judiciary. CORBIN § 582, at 457.

[48] Professor Williston saw such a subjective approach as a threat to the very existence of the rule. In his opinion:

> [T]he practical value of the rule would be much impaired if either party to a writing were allowed to rebut the presumption that a writing is an integration by proof of any contemporaneous oral agreement.

WILLISTON § 633, at 1014.

case, the trial judge would have made a preliminary finding of fact on the question of the parties' intent after hearing the testimony of the salesman and all other evidence relevant to the issue.[49] If the judge had found that the parties intended the sales contract to be the complete and exclusive statement of the terms of their bargain, the parol evidence rule would have operated to exclude the salesman's testimony and any other parol evidence which would have altered, varied, or contradicted the writing.[50] Such evidence would have been incompetent and could not have been considered in deciding the case on the merits. If the court had found the contrary, however, then the writing would have been deemed a partial integration which could have been supplemented by the testimony of the salesman as a consistent additional term, provided that the term was not found to be one which the parties certainly would have included among the written terms of the contract.[51]

Paul J. Delcambre, Jr.

---

[49] *See* note 40 and accompanying text *supra*.

[50] *See* note 39 and accompanying text *supra*.

[51] *See* notes 37 & 38 and accompanying text *supra*. "To be inconsistent the term must contradict or negate a term of the writing. A term or condition which has a lesser effect is provable." Hunt Foods & Indus., Inc. v. Doliner, 26 App. Div. 2d 41, 270 N.Y.S.2d 937, 940 (1966).

BOOK REVIEW

ARBITRATION OF INTEREST DISPUTES:
PROCEEDINGS OF THE TWENTY-SIXTH ANNUAL MEETING,
NATIONAL ACADEMY OF ARBITRATORS
Barbara D. Dennis and Gerald G. Somers, editors.
BNA Books, Washington, D.C. 1973. Pp. 320. $12.00.

*Earl W. DeHart**

Arbitration of Interest Disputes: Proceedings of the Twenty-Sixth Annual Meeting, National Academy of Arbitrators is a compilation of papers prepared for and presented to the Academy's membership. The title, *Arbitration of Interest Disputes*, is slightly misleading since only two chapters are related directly to that topic; the remainder of the book is devoted to other matters of current interest in the field.

The overview of interest arbitration shows its conception some 75 years ago, but its subsequent use has been restricted largely to the transit and newspaper publishing industries. While the treatment of interest arbitration in those industries is interesting and informative, it appears that the potential of the process in resolving interest disputes in the burgeoning field of public employee bargaining will create much wider interest.

Moving into another area, the chapter entitled "Updating Arbitration" contains a splendid presentation of the recently instituted program for expedited arbitration of minor disputes in the steel industry along with some penetrating comments by experts in the field of labor relations.

Two other areas presented are worthy of comment for divergent reasons. The chapter devoted to discipline for refusal to cross picket lines presents a thorough tracing of case law devoted to this perennial problem for labor attorneys, while the chapter treating arbitration of disputes between professional athletes and club owners provides something of a behind-the-scenes view against which we can better evaluate those articles in the sports section.

Harold Davey's presentation, "Situation Ethics and the Arbitrator's Role," providing as it does a large measure of deserved self-criticism and suggested improvements for the body of professional arbitrators composing the Academy, is perhaps the most worthwhile contribution to the book. In fact, looking back, those readers who are from time to time called upon to explain or justify the awards of arbitrators will find the asides more helpful in that task than the direct commentary.

---

* Partner, Weintraub & DeHart, Memphis, Tennessee; and Adjunct Professor of Law, University of Mississippi. B.S. 1955, LL.B. 1958, University of Virginia.

We make

Savings

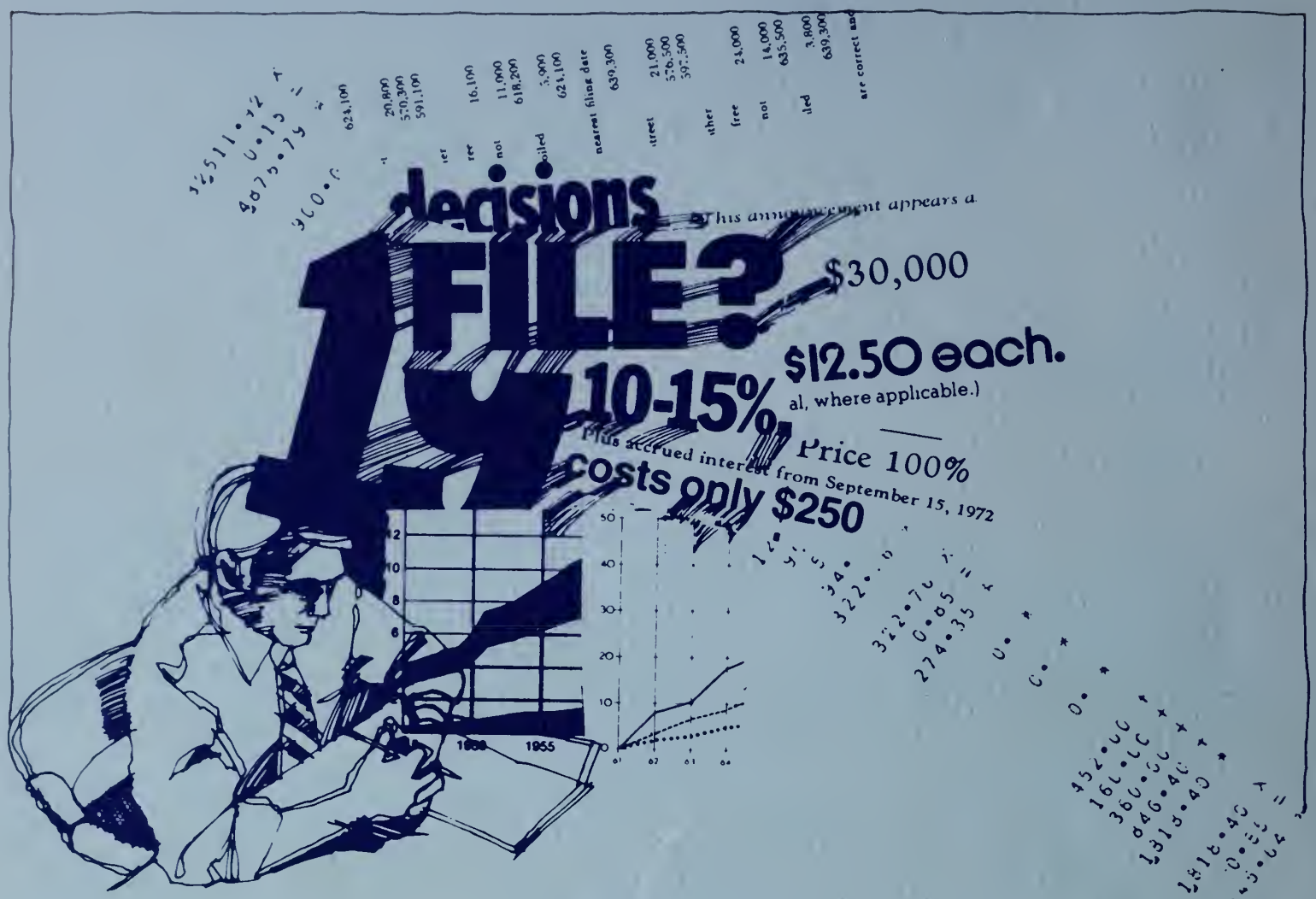
OUR BUSINESS . . .

AND WITH OVER $65,000,000 IN ASSETS WE ARE BETTER ABLE TO SERVE THE NEEDS OF YOUR CLIENTS THROUGHOUT NORTH MISSISSIPPI WITH FIRST MORTGAGE HOME AND COMMERCIAL REAL ESTATE LOANS OR AS A LEGAL DEPOSITORY FOR ESTATES, GUARDIANSHIPS, AND TRUST FUNDS.

Offices in

Batesville * Starkville * Clarksdale
Pontotoc * Cleveland * Senatobia
Ripley * Houston * Oxford * Grenada
New Albany * Hernando * Horn Lake

North Mississippi Savings & Loan Assoc.



Freedom From Financial Worry

That's one of the most important services you can provide your client. In fact, it's what your client really looks to you for.

It's our business, too. Our Trust Department offers sound, professional financial counseling on such matters as retirement plans, estate planning, investment management and other fiduciary services.

These are some of the ways we can work with you and others to provide total estate planning that will free your client from financial worry.

Put your client's trust in us!

First National Bank
Jackson, Mississippi Member FDIC

BRANCHES: Amite County Bank, Gloster/Liberty;
Commercial National Bank, Greenville/Leland; First National Bank, McComb;
The Bank of Greenwood, Greenwood; Tylertown Bank, Tylertown